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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1920

No. 524

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

CORONADO BEACH COMPANY
Defendant.

In Error to the District Court of the United States for the Southern District of California.

BRIEF FOR DEFENDANT.

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No. 524

THE UNITED STATES OF AMERICA,
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CORONADO BEACH COMPANY
Defendant.

In Error to the District Court of the United States for the Southern District of California.

BRIEF FOR DEFENDANT.

Statement.

This brief pertains to the transcript of record, entitled as above, bearing the number 524. It is addressed to the matter of "Appraisement".

The "Determination of any rights"—of the title—of The Coronado Beach Company, to "the whole of North Island" is considered in the brief of The

Coronado Beach Company, which pertains to the transcript of record, bearing the number 525. To that brief, as to this, we have attached a replica of the delineations of the plat which accompanies the patent, and which expresses the delimitations of the peninsula, not island, covered by the grant and patent. North Island, so called, is not an island, but part of a peninsula. (Photographic copy of the plat will be found against page 114 of the transcript in No. 524.)

As will be seen by reference to the brief in No. 525, which, perhaps, may be read first in order, the Act of Congress on which the proceeding goes, refers to the tract of land in question as "the whole of North Island". So does the bill of complaint (Tr. p. 4.) The original grant recites that the land

> "is bounded on the north by the Estero (Bay) of the Port of San Diego towards the town, east by the end of the Rancho of San Augustin Melisse, south by the sea, and west by the Bay or *Anchorage for Ships*, as explained by the map which goes with the Espediente" (Tr. p. 27).

A glance at the map attached to this brief, or at the plat of survey, accompanying the patent, will show that the boundary on the west "by the bay or anchorage for ships", takes in the tide land forming the western part of North Island. This western boundary of North Island is designated in the map attached to this brief, as "U. S. Grant Line"; and in the original grant, as "anchorage of ships" (Tr. p. 27); and in the decree of con-

firmation, as "Anchorage for Ships" (Tr. p. 34); and in the plat of survey accompanying the patent, as "Anchorage for Ships" (Tr. p. 114).

Error has been assigned by plaintiff to the action of the district court in refusing to give the jury this instruction:

> "You are instructed that *the State of California* is the *owner* of all land bordering upon tidewater within the state, which is below the ordinary high water mark. Therefore the *private ownership* of land bordering upon tidewater in this state can *only* extend to the ordinary high water mark" (Tr. p. 107).

To the contrary, the district court gave to the jury the following instruction, to which error is also assigned:

> "The land in question whose value you are to fix, and which has been described in Act of Congress as *the whole of North Island*, includes not only the upland, as it has been termed, but also the tidelands in question. The ownership of the Coronado Beach Company in the whole of North Island does not stop at the line of Ordinary high tide. That ownership is extended out by the United States patent, and by the law of this case, to the Anchorage of Ships, and the line of that anchorage is precisely defined by the United States Survey accompanying the patent, and which has been delineated before you upon the maps admitted in evidence" (Tr. p. 107).

The instruction thus quoted expresses the position of this defendant, so far as the granted, confirmed and patented land in this particular case is con-

cerned,—in opposition to the claim made by counsel for the government in the rejected instruction, that the ownership of the tideland of North Island, though defined by grant, decree, survey, and patent, rested, nevertheless, in the State of California.

These opposing contentions had been presented to the district court, just in advance of the actual hearing upon the appraisement. It was the decree of the district judge, and, as well, the position taken by counsel for the government, that the appraisement arrived at should, in whatever aspect, be a final one. The court had remarked that the argument of counsel for The Coronado Beach Company,

> "that his patent carries the title to this . . . land out to this survey (anchorage of ships), has impressed the court very forcibly, and I would like to have a proceeding here that would be final";

whereupon counsel for the government proposed the course, adopted by the court, of taking three verdicts.

> "If your Honor please", he said, "I expect to ask the court to instruct the jury to find three verdicts: one, the value of the land claimed by the defendant, 2,147 acres; another, the value of the land within the high water, 1,297 acres, less a small body of land belonging to the government; third, the value of the land outside of the upland, in other words, the tide and submerged lands. Your Honor made that suggestion months ago, and neither side could see its way clear; but as the case has shaped itself, the government expects to ask you to instruct the jury to find those three verdicts.

> The COURT. The burden of deciding what is North Island will be greatly lessened on this court, if we can get a verdict specifying the damages separately as to those items; and I apprehend that when such a verdict goes to the Supreme Court, that they could arrive at a correct judgment and end the case" (Tr. pp. 42-3).

Accordingly, the verdict of the jury was prepared and returned, without objection by the government to the form or manner thereof, appraising, in the first place, the whole of North Island; in the next place, the land lying above high water mark; and in the third place, the tide land. The appraisement of the upland was, itself, separated into the "mesa" (table land, or principal area) land, and into a relatively smaller quantity of "meadow, marsh, and beach land", all lying above high water mark.

The Coronado Beach Company, in its answer, had set the value of the whole of North Island at $7,500,000 (Tr. p. 8). The verdict fixed the appraisement as of August 1, 1917, the date stipulated by counsel, and in terms as follows:

> "VERDICT.
>
> "We, the jury in the above-entitled cause, find that the fair market value of the whole of North Island, as of August 1st, 1917, was $5,000,000 (five million dollars).
>
> ANSWERS TO SPECIAL INTERROGATORIES DIRECTED BY THE COURT.
>
> No. 1. What was the fair market value on August 1, 1917, of the land lying above high-

water mark, containing 1,232.93 acres, more or less, referred to as mesa land?

Answer. $4,625,000.00 (four million six hundred twenty-five thousand).

No. 2. What was the fair market value on August 1, 1917, of the 207.24 acres lying above high-water mark, referred to as meadow, marsh, and beach land?

Answer. $45,000.00 (forty-five thousand).

No. 3. What was the fair market value on August 1, 1917, of the lands lying below high-water mark, consisting of 663.3 acres, more or less, referred to as tide or submerged lands?

Answer. $330,000.00 (three hundred thirty thousand)." (Tr. p. 106.)

The judgment recites the appearance of the parties by their counsel, the impanelment of the jury, the agreement of counsel upon August 1st, 1917, as the date for the appraisement, the introduction of evidence by the parties, the argument of counsel, instructions of the court, and the submission to the jury (Tr. pp. 17, 18).

The verdict of the jury is then set out in terms, the filing of the same by the clerk, and the entry thereof in the minutes of the court. The fact that the plaintiff, at the time of trial, was, and since August 1, 1917, had been, in possession of the premises for the purposes mentioned in the complaint, is stated, and the court proceeds to adjudge:

(1) Defendant's sole and exclusive ownership in fee simple of the land in question, "free and clear of any easement, estate, interest, right, title, claim or demand of any kind, character or description, of

plaintiff, United States of America, in or to the same, or in or to any part or parcel thereof, for use for the defense or security of the nation, or for any purpose whatsoever" (Tr. p. 19).

(2) That plaintiff "has no easement, estate, interest, right, title, claim or demand, or any kind, character or description, in or to the tract of land hereinafter described, or in or to any part or parcel thereof, for use for the defense or security of the nation, or for any purpose whatsoever, or at all" (Tr. p. 19).

(3) "That the public interest and necessity require that the possession and use of the tract of land hereinafter described, and the whole thereof, be taken and maintained by plaintiff permanently; and that the said tract of land, and the whole thereof, be condemned by plaintiff for use for national defense, and, in connection therewith, as sites for permanent aviation stations for the army and navy, and for aviation-school purposes" (Tr. p. 19).

(4) That the proposed use is authorized by law, and the taking is necessary thereto (Tr. p. 19).

(5) The area of land sought to be condemned was, on August 1, 1917, and now is, 2103.47 acres (Tr. p. 19).

(6) Of this total acreage, 1232.93 acres, more or less, were, on August 1, 1917, and now are, mesa land, lying above high water mark, and 207.24 acres, meadow, marsh and beach land, lying above high water mark; and 663.3 acres, more or less, tide or

submerged lands, lying below high water mark (Tr. p. 20).

(7) (8) (9) (10). These paragraphs repeat the valuations returned by the verdict (Tr. p. 20).

(11) "That the plaintiff, within thirty days after the entry of this judgment, shall pay the defendant, Coronado Beach Company, a corporation, or into court for it, the sum of five million (5,000,000) dollars, that being the amount of the fair market value of the property sought to be condemned by plaintiff for the uses and purposes aforesaid" (Tr. p. 20).

(12) "That upon paying the sum of five million (5,000,000) dollars, hereinabove directed to be paid, the plaintiff, United States of America, will be entitled to a final order of condemnation, particularly describing the property condemned, and stating the purposes of such condemnation, which purposes are hereinbefore set forth" (Tr. p. 21).

(13) "That upon the making, entering, and recording of said final decree of condemnation, the plaintiff herein shall have full right and liberty of using the tract of land hereinafter described, and the whole thereof, for national defense, and, in connection therewith, as sites for permanent aviation stations for the army and navy and for aviation-school purposes" (Tr. p. 21).

(14) "That the tract of land herein sought to be condemned is situate in the Harbor of San Diego, in the County of San Diego and State of California,

and is known, designated, and described as the whole of North Island, in the Harbor of San Diego, California; excepting therefrom, those certain pieces or parcels of land within the exterior limits of the said North Island which are described in that certain deed from Coronado Beach Company, a corporation, to the United States of America, recorded September 12, 1901, in Book No. 312 of Deeds, at page 185 et seq., of the records of said County of San Diego, California, containing thirty-eight and fifty-six hundredths (38.56) acres, more or less; and in that certain deed from Coronado Beach Company, a corporation, to the United States of America, recorded in Book No. 211 of Deeds, at page 381 et seq., of the records of said County of San Diego, California, containing eighteen and eighty-five hundredths (18.85) acres, more or less.

"Done in open Court this 1 day of June, 1920,

Trippet, Judge.

"Approved as to form,

George J. Denis,

Special Assistant to the Attorney General.

(Entered and recorded June 1, 1920)" (Tr. p. 21).

The judgment, therefore, while setting forth the several appraisements, returned by the jury, as between upland and tideland, adjudges the amount to be paid at the sum of five million dollars, as for "the whole of North Island"—delimited by the line of the United States Survey and Patent, defining "the Anchorage of Ships".

No error is assigned to the form of the general verdict or of the special appraisements, as submitted to the jury in the instructions of the court. No question as to the amount is involved here. The principal question is presented, as to whether title to the tidelands was a proper subject of "appraisement", as being in this defendant by force of the Mexican grant and patent, as against any title attributable to the State of California. A minor assignment of error to the ruling of the court admitting in evidence, for the strictly limited purpose of illustrating the testimony of the witness, a map or diagram, will be noticed in the sequel.

At the threshold, however, is a question of appellate jurisdiction.

I.

UNDER THE ACT OF JULY 27, 1917, c. 42, 40 Stat. 247, THE JUDGMENT OF THE DISTRICT COURT IS NOT REMOVABLE TO THIS COURT, FOR THE EXERCISE OF APPELLATE JURISDICTION BY WRIT OF ERROR.

It is said in the government's brief, that when the resolution, which afterwards became the Act of July 27, 1917, was reported to the Senate (Cong. Rec., Vol. 55, pt. 5, p. 5100) it was accompanied, as part of the Report of the Committee, by a letter from the Secretary of War. This letter, it is further said, gives the opinion of a joint army and navy board, "that North Island was the best location in the country for the establishment of the joint

army and navy station", and recommends that authority of Congress be obtained for taking possession thereof. This same letter it is to be remarked, refers to the fact "that the title of the claimants to North Island rests on the confirmation of a Mexican Grant". The claim of the government to the "easement" discussed in our brief in No. 525, is mentioned, and it is said:

> "The question is not free from doubt, and it is the view of this Department that the legislation should provide, as in the draft submitted, for the determination of the respective rights of the claimants and the government to these lands, and for the payment to the claimants of the appraised value of any rights they may have in said island over and beyond the rights of the United States in the premises. It is accordingly recommended that the legislation take this form."

Hence it is that the Act of Congress of July 27, 1917, and the proceedings thereunder, involved something more than the simple exercise of the power of eminent domain, which has been said to be "the assertion of a right legal in its nature" (R. Co. v. District of Columbia, 195 U. S., p. 328). And so it was that, in the case just cited, the appeal was dismissed, and the case was held to be examinable only on the writ of error. The Act of Congress which rules the proceeding at bar follows the recommendation of the Secretary of War, and provides for "matter of equitable cognizance" (R. Co. v. District of Columbia, supra, p. 329); "for the determination of the respective rights of

the claimants and the government to these lands", to repeat the language of the Secretary of War. The Act of Congress in terms authorizes "the attorney general or the claimants", either of them, "to make application for the *determination* and appraisement of any rights private parties may have in the said island, over and beyond any rights thereto in the United States, to the District Court of the United States for the Southern District of California"; and, as stated in an opening paragraph of the government's brief, "the bill of complaint was filed in equity". When Congress came, in this self-same statute, to commit the appellate jurisdiction to this court, without interposition of the Circuit Court of Appeals, no provision was made for a writ of error. The appellate jurisdiction was conferred on this court by appeal from the judgment of the district court. The statute reads:

> "Either party *may take an appeal* from the judgment of such court (District Court) direct to the Supreme Court of the United States within ninety days after such judgment is rendered.'

In Rhode Island v. Massachusetts, 12 Pet. 657, 720, it is said:

> "As this court is one of limited and special original jurisdiction, its action must be confined to the particular cases, controversies, and parties over which the constitution and laws have authorized it to act; any proceeding without the limits prescribed, is *coram non judice*, and its action a nullity. And whether the want

> or excess of power is objected by a party, or is apparent to the court, it must surcease its action, or proceed extra-judicially."

And speaking of the appellate jurisdiction, it was said in Shipbuilding Co. v. Hagg, 219 U. S. 175, 179:

> "This court takes notice of its own jurisdiction; and whether the question is raised by the counsel or not, inquires of its own motion whether there is jurisdiction to entertain any given case before it. Ry. v. Swan, 111 U. S. 379-382. In that case Mr. Justice Matthews, who spoke for the court, said:
>
> "'On every Writ of Error or Appeal, the first and fundamental question is that of jurisdiction; first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it.'"

The writ of error was dismissed for want of jurisdiction (p. 179).

In Barry v. Mercein, 5 How. 103, 119, Mr. Chief Justice Taney said:

> "By the Constitution of the United States, the Supreme Court possesses no appellate power in any case, unless conferred upon it by Act of Congress; *nor can it, when conferred, be exercised in any other form or by any other mode of proceeding, than that which the law prescribes.*" And the writ of error was dismissed.

"Courts which are created by written law", it was said in a case cited in the government's brief (Ky. v. Powers, 201 U. S. 1, 24), "and whose jurisdiction is *defined by written law*, cannot transcend that jurisdiction".

"When the Constitution," said Chief Justice Marshall (U. S. v. More, 3 Cranch. 159, 171), "has given Congress power to limit the exercise of our jurisdiction, and to make regulations respecting its exercise; and Congress, under that power, has proceeded to erect inferior courts, and has said in what cases a writ of error or appeal shall lie, an exception of all other cases is implied. And this court is as much bound by an implied as an express exception."

"The question, then, is, whether the word appeal, in the twenty-second section (of the Judiciary Act of 1789) is to be understood technically, or merely as descriptive of the appellate jurisdiction of the Superior Court, without regard to *the particular mode* by which a cause is transmitted to that jurisdiction? This question appears to have been considered by the Supreme Court so early as the year 1796, in the case of Wiscart v. D'Auchy. Chief Justice Ellsworth, in delivering the opinion of the court in that case, expresses himself as follows: 'The Act of 1789 speaks of appeal and writ of error, but does not confound them. They are to be understood according to their ordinary acceptation. An appeal is a civil-law process, and removes a cause entirely, subjecting the law and fact to a review and retrial. A writ or error is a common-law process, and removes for re-examination, nothing but the law. This statute observes this distinction'." And the court, in respect to the term appeal, holds that "the legislative meaning of the term is ascertained" (*U. S. v. Goodwin*, 7 Cranch. 108, 110-111).

In Dower v. Richards, 151 U. S. 658, 663, this court said:

"In the legislation of Congress from the foundation of the government, a Writ of Error,

which brings up matter of law only, has always been distinguished from an Appeal, which, unless expressly restricted, brings up both law and fact."

In the case of "The Francis Wright", 105 U. S. 381, 385, this court quotes the language of Mr. Chief Justice Ellsworth, as follows:

"If Congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction; and if the rule is provided, we cannot depart from it. The question, therefore, on the constitutional point of appellate jurisdiction, is simply whether Congress has established a rule for regulating its exercise."

And again:

"It is observed that a writ of error is a process more limited in its effects than an appeal; but whatever may be the operation, if an appellate jurisdiction can only be exercised by this court conformably to such regulations as are made by the congress; and if congress has prescribed a writ of error, *and no other mode*, by which it is to be exercised, still, I say, we are bound to pursue *that mode*, and can neither make nor adopt another."

We have only such appellate jurisdiction as has been conferred by Congress; (U. S. v. Young, 94 U. S. 259) and in the exercise of such as has been conferred, we can proceed *only in the manner* which the law prescribes. From the judgments of the court of claims, *appeals* are allowed to this court; but *no provision has been made for writs of error. Consequently, we cannot proceed by writ of error to review the decisions of that court.*"

And in American Construction Co. v. Jacksonville Railway, 148 U. S. 372, 378, this court said:

> "By the Constitution of the United States, in cases to which the judicial power of the United States extends, and of which original jurisdiction is not conferred on this court, 'the Supreme Court shall have appellate jurisdiction, with such exceptions and under such regulations as the congress shall make'. Constitution Art. 3, Sec. 2. This court, therefore, *as it has always held,* can exercise no appellate jurisdiction, except in the cases, and *in the manner and form,* defined and prescribed by congress."

It is submitted, therefore, that the writ of error should be dismissed.

II.

THE WESTERN BOUNDARY OF "THE WHOLE OF NORTH ISLAND" IS PRECISELY DEFINED TO INCLUDE THE TIDELAND AREA, BY THE UNITED STATES PATENT AND THE PLAT OF SURVEY ACCOMPANYING THE SAME AND A PART THEREOF. THE STATE OF CALIFORNIA, AS OF ITS SOVEREIGN STATUS, NEVER HAD TITLE TO THESE PARTICULAR TIDELANDS, LYING INSIDE OF THE BOUNDARY LINE FIXED BY THE UNITED STATES SURVEY WHICH SUPERVENED UPON THE DECREE OF CONFIRMATION AND ACCOMPANIED THE PATENT. THESE PARTICULAR TIDELANDS, BY ELDER AND PATENTED TITLE, PASSED IN FEE SIMPLE ABSOLUTE TO THE MEXICAN GRANTEE, OR HIS SUCCESSORS IN INTEREST, PURSUANT TO THE CONFIRMATION OF THE MEXICAN GRANT.

It is conceded in the government's brief, as it must have been (Jover v. Insular Government, 221 U. S. 623, 629),

> "that the Crown, or the Congress of Mexico, could for the common benefit limit the general rule of the Civil Law, and grant the seashore for appropriate purposes."

Mexican grants including tidelands, were made under the former government of California; they were recognized and protected by this government, as a matter of international obligation, under the law of nations, and under the treaty between this country and Mexico, of Guadalupe Hidalgo; the act of March 3, 1851, was passd to fulfill that international obligation. The ascertainment and settlement of private land claims, resting upon just such grants, was committed by that act to the judicial tribunals of this country, with power to determine the validity of the claim, finally and conclusively, between the claimant and the United States; and in sequence, to the political department of the government to fix the correct location of the grant, "so as to embrace the premises as they are surveyed and described" (Beard v. Federy, 3 Wall. 478). The inquiry by these tribunals into the validity of such claims involved "an inquiry *into the authority of the officer to make the grant,* or whether he was in the exercise of the faculties of his office when it was made" (U. S. v. Fossatt, 21 How. 445, 448).

> "But, in addition to these questions upon the validity of the title, there may arise questions of *extent, quality, location, boundary* and *legal operation,* that are *equally essential* in determining the validity of the claim. In affirming a claim to land under a Spanish or Mexican

> grant to be valid within the law of nations, the stipulations of the treaty of Guadalupe Hidalgo, and the usages of those governments, we imply something more than that certain papers are genuine, legal, and translative of property. We affirm that *ownership* and possession of land, of *definite boundaries,* rightfully attach to the grantee" (U. S. v. Fossatt, supra).

In Los Angeles Milling Co. v. Thompson, 117 Cal. 594, the authority of the Mexican Governor of California to make a grant of Mission lands was in question. This court had held, in U. S. v. Workman, 1 Wall. 745, a direct proceeding under the act of March 3, 1851, that the governor had no power to grant "Mission lands". But the grant in Milling Co. v. Thompson, although of Mission lands, had been confirmed by the Board of Land Commissioners in the direct proceeding under the Act of March 3, 1851, and that decree of confirmation became final, unreversed by any appeal to this court. The Supreme Court of California held that the decree of confirmation could not be collaterally assailed, and that *the authority of the governor* to make the grant was concluded beyond question by the decree of the Board of Land Commissioners.

> "The Board of Land Commissioners", it was said, "was authorized to adjudicate upon the validity of *every claim* for lands in California which purported to be derived from the Spanish or Mexican government. The *validity of the claim* included *the authority of the governor to make the grant,* as well as *the existence or effect of the laws of Mexico concerning the same;* and the *jurisdiction* of the Board ex-

> tended to *the determination of each of these questions as fully* as to determining whether there had been a full compliance with the forms of law in making the grant, and its judgment thereon cannot be collaterally assailed on account of any error it may have committed in reference thereto" (p. 599).

The Supreme Court of California cites the decision of this court in Beard v. Federy, 3 Wall. 478, and quotes from it as follows:

As to the decree:

> "The Board having acquired jurisdiction, the validity of the claim presented, and whether it was entitled to confirmation, were matters for it to determine, and its decision, however erroneous, cannot be collaterally assailed on the ground that it was rendered upon insufficient evidence."

As to the patent:

> "By it, *the government declares* that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, and *is correctly located now* so as to embrace the premises *as they are surveyed and described.* As against the government, this record, *so long as it remains unvacated,* is conclusive, and it is equally conclusive against parties claiming under the government by title subsequent."

When Milling Co. v. Thompson came here (180 U. S. 72) it was urged, in support of the assignment of error, that the *governor* of the California *had no authority to make the grant,* and

therefore the decree of confirmation was without that authority of law, and was absolutely void, and a mere nullity (p. 76). It was said by this court that the Board of Land Commissioners was

> "a special tribunal, limited to hear a particular class of claims, but *not limited* to the questions of *law* and *fact* which *could arise* in passing on and determining the validity of any claim of the class. * * * If there should be a wrong decision, the remedy was not by a collateral attack on the judgment rendered. *The statute provided the remedy.* It allowed an appeal to the district court of the United States, and from thence to this court. Legal procedure could not afford any better safeguards against error. *Every question which could arise on the title claimed could come to and receive judgment from this court. The scheme of adjudication was made complete, and all the purposes of an act to give repose to titles were accomplished? And it was certainly the purpose of the Act of 1851, to give repose to titles.* It was enacted not only to fulfill our treaty obligations to individuals, but to settle and *define what* portion of the acquired territory was public domain. * * * The jurisdiction of the Board was necessarily commensurate with the purposes of its creation, and it was a jurisdiction *to decide rightly or wrongly.* If wrongly, a corrective was afforded, as we have said, by an appeal by the claimant *or by the United States* to the district court (Sec. 9). Indeed, the proceedings in the district court were really new, and further evidence could be taken (Sec. 10). Upon the confirmation of the claim by the Commissioners, or by the district or supreme court, a *patent* was to issue and to be *conclusive against the United States"* (Sec. 15). (pp. 77-8).

The language of this court in Thompson v. Milling Co., just quoted, is repeated with approval in Barker v. Harvey, 181 U. S. 72, 77. This latter case deals with the term "servitudes" (servidumbres), to which a passing reference is made in the government's brief, and which is covered by our brief in No. 525, pp. 43-8.

The law of Mexican grants including tidelands, in California, came before Mr. Justice Field, then Chief Justice of the Supreme Court of California, at an early day, in Teschemacher v. Thompson, 18 Cal. 11 (April Term, 1861). The action was ejectment. The plaintiffs relied on a Mexican grant. The defendant set up the title of the State of California. The land in question "was, *at the date of the admission of California as a State into the Union,* below the ordinary high water mark of the Bay of San Francisco; in other words, was covered by the flow of the ordinary or neap tides of the bay" (p. 22).

> "Upon that assumption", says Mr. Justice Field, "the land thus occupied belonged at that date to the State—unless it had been the subject of *a previous grant by the Mexican government,* which the United States, *upon the acquisition of the country,* were bound to protect, *and which they have since recognized and confirmed.* Until the acquisition of the country, the land was, of course, under the jurisdiction, control and disposition of the former government; and the rights acquired by the United States were in subordination to the action of that government, so far as such action was entitled to consideration either from the law of

> nations, or the stipulations of the treaty of cession. In that respect, *the land under the tide-waters of the Bay,* between low and high water mark, *stood in no different position from that of any other land over which the former government possessed the power of disposition*" (p. 22).

Again:

> "When, therefore, California was ceded to the United States, the rights of property of its citizens remained unchanged. By the law of nations, those rights in the language of the Supreme Court, were 'sacred and inviolable'. And the obligation passed to the new government to protect and maintain them. The obligation was political in its character, binding upon the conscience of the new government, and to be executed by proper legislative action when the requisite protection could not be afforded by the ordinary course of judicial proceedings in the established tribunals, or by existing legislation" (p. 23).

And further, as to the patent, in memorable language, embodied afterwards in the opinions of this court, Mr. Justice Field goes on to say:

> "As the last Act in the series of proceedings, a patent is to issue to the claimant. This instrument is not only the deed of the United States, but it is a solemn record of the government, of its action and judgment with respect to the *title* of the claimant existing *at the date of the cession.* By it, the sovereign power, which alone could determine the matter, declares that the previous grant was genuine: that the claim under it was valid and entitled to recognition and confirmation by the law of nations and the stipulations of the treaty; and

that the grant was located, or might have been located, by the former government, and *is correctly located by the new government* so as to embrace the premises *as they are surveyed and described.* Whilst this declaration *remains of record,* the *government itself cannot question its verity,* nor can parties claiming through the government by title subsequent" (pp. 25-6).

Mr. Justice Field adds:

"The patent, it is true, as the deed of the United States, takes effect only from the date of the presentation of the petition of the patentees to the Board of Land Commissioners. But, *as the record of the government of the existence and validity of the grant,* it establishes *the title* of the patentee *from the date of the grant*" (p. 26).

"The United States," Mr. Justice Field continues, "upon the cession of the country, took the premises charged with the equitable claim of the Mexican grantees, and have since perfected the claims into a perfect title. But for such equitable claim the United States would have held the title in trust for the new State; but, *the claim existing,* the *State* and all other parties must hold *in subordination to* the action of the government respecting it. The right and power of the government to protect and thus perfect the equitable claim *were superior,* as we have shown, to any *subsequently acquired* rights or claims *of the State* or of individuals. *Immediately* upon the cession of the country, the government could have complied with its obligations, and at once have perfected the claim. Subsequent events not originating with the grantees can have no effect upon the validity of their claim, or the duty of the government respecting it" (pp. 27-8).

In concluding the opinion, Mr. Justice Field notices the case of Goodtitle v. Kibbe, 9 How., 471, which is mentioned in the government's brief. The grant in that case was a Spanish grant. It was made after the treaty of St. Ildefonso, by the terms and effect of which treaty Spain was deprived of the power to make grants of land in Louisiana. The grant was simply and merely void, a nullity, and of no effect to qualify the title in lands below high water mark, which accrued to the State of Alabama on its admission into the Union.

> "And hence," Mr. Justice Field observes, "the court very properly remarks in Goodtitle v. Kibbe that the existence of the imperfect and inoperative Spanish grant, which the plaintiffs in that case produced, could not enlarge the power of the United States over the place in question, *after* Alabama became a State, nor authorize the general government to grant or confirm a title to land when the sovereignty and dominion over it *had* become vested in the State—in other words, that the existence of a previous *void* grant did not enlarge the power of the general government over the premises, and its confirmation by that government, *subsequent* to the admission of Alabama, did not impair her rights. The distinction between that case and the one at bar is too obvious to require comment" (pp. 28-9).

Knight v. U. S. Land Assn., 142 U. S. 161, turned on the title to lands under the navigable tidal waters of Mission Bay, as it is often called, or Mission Creek, an arm of the great Bay of San Francisco. It was a contest between title derived from the City and County of San Francisco, as the successor of

the Mexican pueblo, and title derived from the State of California and attributed to its dominion over tidelands, in its status of a sovereign State. The pueblo title had been submitted to the Board of Land Commissioners, under the Act of March 3, 1851; for there was no difference, in this respect, between pueblos and individuals. The pueblo title was confirmed; the pueblo grant was surveyed and patented.

Prior to patent to the pueblo, the pueblo claim had been surveyed in fulfillment of the international obligation of the government, as a final and conclusive step to determine that it "is correctly located so as to embrace the premises as they are surveyed and described" (Beard v. Federy, supra). This original survey followed the line of high water mark of the bay, as a boundary, until it came to Mission Bay. But instead of crossing Mission Bay from headland to headland, in pursuit of the main high water mark of the bay, it turned round the first headland, and into Mission Bay, and followed the meander lines of that water up one side, across to the other side, and down that other side to the opposing and second headland, and then resumed its course along the main high water mark of San Francisco Bay. The effect of that survey, if it had been allowed to stand, was to throw the lands under the navigable waters of Mission Bay outside the surveyed boundary line of the pueblo, and to assign them to the category of State tidelands, attributable to the ownership of the sovereign State.

But the original survey was not permitted to stand. The Secretary of the Interior, in the exercise of his supervisory and ultimate authority, as the head of the Land Department, set aside the action of the Commissioner of the General Land Office in approving the survey, and ordered a new survey to be made. That second survey, instead of following the meanders of Mission Bay, crossed that water, at its mouth, from headland to headland, pursuing the main tide line of San Francisco Bay. The effect of the survey thus made was to put the land under the navigable waters of Mission Bay inside the boundary line of the pueblo grant, and to establish the title of San Francisco to those lands, as by grant from the former government, confirmed, surveyed and patented under the treaty and the Act of March 3, 1851, and overcoming any title imputed to the State, subsequently to the Treaty of Cession, and as of the date of the admission of the State into the Union on September 9, 1850.

The land in controversy was a part of the lands under the navigable and tidal waters of Mission Bay. The pueblo title, it was held here, overcame any title attributed to the State in its status as such.

The opinions of this court, in Knight v. Land Assn., are of historical interest, as having been written, one by Mr. Justice Lamar, who had himself been Secretary of the Interior, and the other by Mr. Justice Field, who had been a commanding

figure in shaping the jurisprudence of California, and indeed of the nation, as to Mexican land titles.

Mr. Justice Lamar, in the most convincing way, vindicates the authority of the Secretary of the Interior, to set aside the original survey, and to order and give finality to the second survey, upon which the patent went.

> "The Secretary of the Interior," he concludes after full consideration, "had ample power to set aside the Stratton Survey, and order a new survey by Von Leicht; and his action in such matter is unassailable in the courts in a collateral proceeding" (p. 182).

And again, in speaking of the survey as a thing of finality, like the record of a final judgment, he says:

> "It is a well-settled rule of law that the *power* to make and correct *surveys* of the public lands belongs *exclusively to the political department* of the government, and that the *action* of that Department, within the scope of its authority, *is unassailable in the courts except by a direct proceeding*" (p. 182).

He now takes up the contention that "the land in dispute never was a portion of the pueblo of San Francisco, because, at the date of the Conquest, it was below the ordinary high water mark of Mission Creek, and, therefore upon the admission of California into the Union in 1850, passed to the State in virtue of its sovereignty over tidelands." And speaking for the court, he says: "To this contention we can not give our assent" (p. 183).

Mr. Justice Lamar concedes freely

> "that absolute property in, and dominion and sovereignty over, the soils under the tidewaters in the original States, were reserved to the several States; and that the new States, since admitted, have the same rights, sovereignty, and jurisdiction in that behalf as the original States possess within their respective borders. Upon the acquisition of the territory from Mexico the United States acquired the title to tide lands equally with the title to upland; but with respect to the former, they held it only in trust for the future States that might be erected out of such territory" (p. 183).

"*But,*" says Mr. Justice Lamar, "*this doctrine does not apply to lands that had been previously granted to other parties by the former government,* or subjected to trusts which would require their disposition in some other way. *San Francisco v. LeRoy,* 138 U. S. 656. For it is equally well settled, that when the United States acquired California from Mexico by the treaty of Guadalupe Hidalgo, 9 Stat., 922, they were bound, under the 8th Article of that Treaty, to protect all rights of property in that territory emanating from the Mexican government previous to the treaty." And he cites Teschemacher v. Thompson, 18 Cal. 11, and Beard v. Federy, 3 Wall., 478, to which we have already made reference. And he adds: "Irrespective of any such provision in the treaty, the obligations resting upon the United States in this respect, under the principles of international law, would have been the same" (pp. 183-4).

He summarizes:

> "If we have succeeded in showing that the tract in dispute was part of the land claimed by the City of San Francisco as successor of

> the Mexican Pueblo of that name; that it is within the four square leagues described in the decree of the United States Circuit Court for the District of California, entered May 18, 1865; that *that court* decided and *decreed* that the *claim of title* was *valid under the laws of Mexico;* that the *official survey* of the United States officers is correct, and followed the decree of confirmation; and that the *patent* of the government of the United States, following the survey and decree, embraced *within its calls* the property in dispute;—we think it clearly follows that the *patent* of the government is evidence of the *title* of the city *under Mexican laws,* and is *conclusive,* not only as *against the government* and against all parties claiming under it by titles subsequently acquired, but also as against *all parties,* except those who have a full and complete title acquired *from Mexico anterior in date* to that confirmed by the decree of confirmation" (p. 184).

Mr. Justice Lamar cites San Francisco v. LeRoy, 138 U. S. 656, 670, 672 as being in point and as holding: "that even if there were any tidelands *within* the Pueblo, *the power and duty of the United States* under the treaty, to protect the claims of the City of San Francisco as successor to the Pueblo, *were superior to any subsequently acquired rights of California over the tidelands*" (p. 185).

He quotes the language of San Francisco v. LeRoy, as to the ineffectiveness of the deed from the State Tideland Commissioners:

> "For the State did not, at that time, own any tide or marsh lands *within the limits* of the Pueblo, *as finally established by the Land Department*" (p. 185).

And also the language of that case as to lands in California, under tide waters, acquired from Mexico, and as to the doctrine that such lands "were held in trust for the future State",—"that doctrine cannot apply to such lands as had been previously granted to other parties by the former government" (p. 186). And this further language, important in its bearing upon the recognition of the Mexican title, as antedating the admission of California into the Union, and going back to the date of the acquisition of the country:

> "The property rights of Pueblos, *equally with those of individuals,* were entitled to protection, and provision was made by Congress in its legislation for their investigation and confirmation. The *duty* of the government, and its *power,* in the execution of its treaty obligations to protect the claims of *all* persons, *natural* and *artificial,*—and, of course, of the City of San Francisco as successor to the Pueblo,—*were superior* to *any subsequently acquired rights or claims of the State of California,* or of individuals. The confirmation of the claim of the city necessarily took effect *upon its title as it existed upon the acquisition of the country*" (pp. 185-6).

Mr. Justice Lamar also quotes and adopts the language of Beard v. Federy, supra, in which, as in San Francisco v. LeRoy, supra, the opinion of this court was delivered by Mr. Justice Field:

> "The obligation to which the United States thus succeeded was, of course, political in its character, and to be discharged in such manner and on such terms as they might judge expedient. By the Act of March 3, 1851, they have

declared the manner and the terms on which they will discharge this obligation. They have there established a special tribunal, before which all claims to land are to be investigated; required evidence to be presented respecting the claims; appointed law officers to appear and contest them on behalf of the government; authorized appeals from the decisions of the tribunal, first to the district and then to the supreme court; *and designated officers to survey and measure off the land,* when the validity of the claims is finally determined. When informed by the action of its tribunal, and officers that a claim asserted is valid and entitled to recognition, the government acts, and *issues its patent* to the claimant. This instrument is, therefore, *record evidence* of the action of the government upon the title of the claimant. By it the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, *and is correctly located now,* so as to embrace the premises *as they are surveyed and described.* As *against the government,* this record, *so long as it remains unvacated,* is conclusive" (p. 188).

Mr. Justice Field had borne a striking part in the development of the law of Mexican grants in California—*quorum pars magna fui*—and he opens his opinion with a personal reference.

"As a correct solution of the questions involved is of vital importance to the security of titles claimed under confirmed Mexican grants in California, followed by *a survey made and a patent issued* under the Land Department of the government, and as I have had personal knowledge of all legal proceedings touching the

> claim of the Pueblo of San Francisco from their commencement, I will venture to make some observations, in addition to those of my brethren, upon the propositions of law advanced by the court below" (pp. 189-190).

Mr. Justice Field gives the history of the confirmation of the city's title by a decree which he himself had made; and of the first and rejected survey, and of the second and final survey which accompanied the patent as a part thereof. He concurs with Mr. Justice Lamar in upholding the authority and last word of the Secretary, as to the finality of the survey, and remarks that, "in this respect, nothing can be added to the force of the statement in the opinion of the majority". He refers "to the frightful unsettlement of titles", and "to the infinite disturbance of the peace of the people", affecting millions of acres of land, if a survey corrected and finally passed by the Secretary of the Interior, could be open to attack (p. 200).

> "The title under the patent", he says, "necessarily antedated *any possible claim of the State of California* to the lands within the limits of the Pueblo. *It went back to the acquisition of this country from Mexico*" (p. 200). (And see Cariño v. Insular Government, 212 U. S., pp. 459-460.)

As to the treaty of Guadalupe Hidalgo, and the international obligation of the United States,

> "Pueblos," he says, "in that respect stood in the same position *as private individuals.* All their rights of property, legal or equitable,

were alike entitled to protection. *Whatever property was ceded to the United States from Mexico,* whether marsh lands or tide lands, passed *subject to the obligation* to protect existing claims to them *of all parties. The State* could take no greater interest than the United States acquired; all lands she received went under her control *charged with the equitable claims of others,* which the United States were bound by the treaty and the law of nations to protect. The marsh lands granted to her by the Act of Congress of September 28, 1850, were thus affected. *And the same was true of the tidelands.* Whatever lands *of that nature* passed to the United States were held for the future State, *subject,* however, to any trust *from the former government,* which might require their disposition in some other way. The duty and power of the United States, in the execution of their treaty obligations to protect the property claims of all persons, natural or artificial, were superior to any subsequently acquired interest of the state or of individuals. *Mexico owned the tidelands as well as the uplands;* and it was, *of course,* in *her power* to make such disposition of them in the establishment and organization of her pueblos as she may have judged expedient. And whether she *did make* such disposition *by her laws,* was a matter *exclusively for the United States* to ascertain and determine" (pp. 201-2).

As to the effect of the patent, with its associated survey, Mr. Justice Field repeats and italicises his own language in Beard v. Federy, supra:

> "By it, the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former

> government, *and is correctly located now so as to embrace the premises as they are surveyed and described. As against the government, so long as it remains unvacated, it is conclusive. And it is equally conclusive against parties claiming under the government by title subsequent*" (Italics by Mr. Justice Field; p. 202).

Again, it is said by Mr. Justice Field that the patent

> "must be taken as correct *until vacated*, not only as to the *validity* of the claim confirmed, *but as to the boundaries established.* It is hardly necessary to say that any attempt to overthrow these conclusions in *either* particular, where the *tribunal affirming the validity* of the claim, and *the department establishing the boundaries,* had jurisdiction, is collaterally attacking the patent" (p. 205).

He continues:

> "That the Land Commissioners and the Circuit Court of the United States had jurisdiction to hear and determine the *validity* of the claims asserted by the City of San Francisco, is not open to question. The *laws* of the United States gave them such jurisdiction, and, when that claim was confirmed, *the law* directed *by what officers* its *boundaries* should be *established and surveyed.* It was the *exclusive province* of those officers to *ascertain* where *the line of true boundary ran,* subject to the control and supervision of the *Interior Department.* To say that those who directed and supervised the survey had not jurisdiction to perform that duty is to deny efficacy to the laws of Congress" (p. 205).

Again:

> "If there was error *in the survey embodied in the patent* it could not have been shown in

this action. It could only have been corrected by *direct* proceedings *for that purpose* instituted by the government or by its authority" (p. 206).

And further:

"The statement in the opinion of the court (referring to the Supreme Court of California) as to the requirement that the Surveyor General, in making the survey of a confirmed claim, should follow the boundaries of the decree as near as practicable, is undoubtedly correct, and it was the duty in this case of the surveying officers of the Land Department, under the supervision of the Secretary of the Interior, to ascertain what those boundaries were, and to follow the decree in making the survey. That they accomplished this is *conclusively established,* so far as the present action is concerned, *by the official survey itself,* returned by them and subsequently approved by the Commission of the Land Office" (p. 209).

Some authorities are referred to in the government's brief on the point that want of authority of the Department to issue a patent may be shown by extrinsic evidence, and it is said that "the cases are reviewed in Knight v. Land Assn., supra, where Doolan v. Carr was approved." The cases were reviewed in Knight v. Land Assn. by Mr. Justice Field, who cites, among others, Doolan v. Carr, 125 U. S., 618, and goes on to remark of these cases:

"They assert no new doctrine, but law which has always existed and been recognized, *though seldom more misapplied than here.* That the United States cannot convey by patent what it never owned or has already parted with, no

matter with what formality the instrument is issued, is a self-evident proposition. The government in that respect is under the same limitations as an individual" (p. 212).

But Mr. Justice Field says something further:

"The court (referring to the California court —in this respect not unlike the government's brief) failed to distinguish between what was, upon its own statement, *mere error* in the action of the Land Department, and matters which were entirely beyond its jurisdiction. The *ascertainment of the true line* of the *boundaries* of the claim confirmed *was a matter especially entrusted to that department by the laws of Congress,* as already stated. If the officers of that department, in executing the survey, made mistakes, ran erroneous lines, and *included* lands which they should have *excluded,* those facts did not justify the assertion that they acted without jurisdiction in making the survey, and that, therefore, their whole proceedings were void. If all that is asserted be true, they only *erred* in the *exercise* of their jurisdiction, and the remedy for their errors, *before* the issue of the patent, lay in an appeal to higher officers of the department—from the surveyor general to the commissioner, and from his decision to the secretary of the interior;—and if, *after* the issue of the patent, like objections were urged, the remedy could be sought *only by direct proceedings*" (p. 212).

And further, says Mr. Justice Field:

"The distinction between errors committed where jurisdiction exists to take the proceeding in which the alleged error arises, and where there is an entire want of jurisdiction over the subject matter considered,—is too familiar to be discussed. The distinction is constantly ap-

> plied with reference to the proceedings of ordinary tribunals. If they had jurisdiction of the subject-matter and the parties, their judgment cannot be collaterally assailed for mere errors committed in the proceedings leading to it. The remedy for errors must be sought by application for a new trial, or by appeal for a review to an appellate court. The *same distinction* prevails with reference to the proceedings of the *special tribunal or department* of the government, *to which is entrusted the supervision of measures for the issue of its patent*" (p. 212).

And finally, it is stated by Mr. Justice Field as the true doctrine, settled

> "by a long line of previous adjudications," that, "upon a confirmation of a Mexican grant, the *patent* issued by the United States to the claimant is the *only evidence* of the *extent* of the grant, and that, *if there is a conflict* as to its *location and extent, between it and the decree of confirmation, the patent must control*. It is the only doctrine which will insure peace and tranquility to parties holding under patent issued under confirmed Mexican grants, any other doctrine would introduce endless confusion and perplexity as to all such titles. If there be, in fact, any material conflict between the *boundaries* given in the *decree of confirmation* and those described *in the official survey*, the *only remedy* is to be sought by *direct proceeding* instituted by the government, or by its authority. Until the alleged conflict is thus determined and adjusted, the *patent must control*" (p. 215).

In the case of Shively v. Bowlby, 152 U. S. 1, it was held, after a painstaking examination by Mr. Justice Gray, that the title and rights of *riparian*

or *littoral* proprietors in the soil below high water mark, are governed by the local laws of the several States (152 U. S., pp. 26, 40). It was further held in that case that the new States, admitted since the adoption of the Constitution, "have the same rights as the original States in the tidewaters and in the lands below the high water mark, within their respective jurisdictions" (p. 26). This is a general principle, not a mere deduction from the terms of a deed of cession, like that from the State of Georgia to the United States; and the general doctrine, as to the rights of the new States, has been constantly applied to California, which was acquired from a foreign country, Mexico, by the treaty of Guadalupe Hidalgo (p. 28). Hence it is, that a Mexican grant of land, not in the Bay of San Francisco, but bounded "by the bay", did not include land below ordinary high water mark. As the court said in Shively v. Bowlby (p. 29), quoting the language of Mr. Justice Field in U. S. v. Pacheco, 2 Wall., 590: "When, therefore, the sea, or a bay, is named as a boundary, the line of ordinary high water mark is always intended where the common law prevails." The Pacheco case was a direct proceeding under the Act of March 3, 1851. Shively v. Bowlby is excerpted by the government's brief, for this reference to the Pacheco case; as if it could have any pertinency to a case controlled by an official survey and patent, which carries the boundary below and beyond the high water mark, and out to the *Anchorage of Ships*, as precisely de-

fined *by the line of the survey.* The government's brief should not have stopped short with this limited excerpt from Shively v. Bowlby. That case does contain statements which have a real pertinency to the case at bar. To begin with:

Shively v. Bowlby (p. 30) cites Knight v. Land Assn., supra, for the general principle that the new States have the same rights in the tidewaters within their respective jurisdictions as the original States; and that, upon the acquisition of the territory from Mexico, the United States, with respect to the tide lands, in distinction from the upland, held the former in trust for the future States. Now, then, the opinion in Shively v. Bowlby at once proceeds to say:

> "In that case (referring to Knight v. Land Assn.) it was further held, as it had previously been declared in San Francisco v. LeRoy, above cited, that 'this doctrine does not apply to lands *that had been previously granted* to other parties *by the former government,* or subjected to trusts which would require their disposition in some other way'; and that, when the United States acquired California from Mexico by the treaty, they were bound by its stipulations, and by the principles of international law, to protect all rights of property acquired *under previous lawful grants* from the Mexican government. And it was therefore adjudged that under a boundary 'by the bay', in the Mexican grant of the Pueblo of San Francisco, duly confirmed by a decree of a court of the United States, and *defined by a survey* under the authority of the Secretary of the Interior, as following the general line of high water mark of the bay, crossing the

mouth of *a tidewater creek*, the *title* of lands inside of that line, although *below high water mark of the creek*, was *included*, and therefore did not pass by a deed from the *State*" (pp. 30-31).

Again, in Shively v. Bowlby (p. 47), it is said:

"Notwithstanding the *dicta* contained in some of the opinions of this court, already quoted, to the effect that Congress has no power to grant any lands below high water mark, of navigable waters in a territory of the United States, it is evident that this is not strictly true.

"Chief Justice Taney, in delivering an opinion already cited, after the subject had been much considered in the cases from Alabama, said: 'Undoubtedly Congress might have granted this land to the patentee, or confirmed his Spanish grant, *before* Alabama became a State.' Goodtitle v. Kibbe, 9 How., 471, 478. In the cases from California, already referred to, the question whether a Mexican grant, confirmed by the United States, did or did not include any lands *below high water mark*, was treated as depending *on the terms of the decree of confirmation* by a court of the United States *under authority of Congress*. By the application of that test no such lands were held to be included in U. S. v. Pacheco, 2 Wall., 587, and *some such lands* were held to be included, in Knight v. U. S. Land Assn., 142 U. S., 161."

"We cannot doubt, therefore," says Mr. Justice Gray in the Shively case, "that Congress has the power to make grants of land *below high water mark*, of navigable waters in any territory of the United States, whenever it becomes necessary to do so *in order to perform international obligations*, or to effect the im-

> provement of such land for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the territory" (p. 48).

It has not been, he says, a general policy of Congress to dispose of these lands, meaning tidelands. The policy of the United States is, that such lands, having a value for commerce, navigation and fishery, "shall not be granted away during the period of territorial government, but, unless *in case of some international duty* or public exigency, shall be held by the United States in trust for the future States" (pp. 49-50, 58).

Los Angeles v. Farming & Milling Co., 152 Cal., 645; 217 U. S., 217, cited in the government's brief, is reviewed in our brief in No. 525, pp. 48-51. The question was between two riparian proprietors, as to their relative rights in the water of the Los Angeles river. No federal question, no issue of law, under the Constitution, Statutes, and Treaties of the United States, was presented. Both parties rested on titles derived respectively from Spanish and Mexican authority, duly confirmed and patented under the Act of March 3, 1851, and those titles, as for their delimitation, took both parties down to the bank of the Los Angeles river. To what extent the two proprietors, as riparians, had rights in the waters of the stream, and, as between themselves, who had the paramount right—this was not a federal question, it was a question of the

local law, depending upon the comparative rights of an individual and a pueblo, both riparians, to the water as it flowed. The local law, the law of Spain and Mexico, put the community or pueblo, justly enough, ahead of the individual. That was the case, and that was why this court declined jurisdiction.

Boquillas Cattle Co. v. Curtis, 232 U. S. 342, cited in the government's brief, is also reviewed in our brief in No. 525, pp. 51-3. Like the Los Angeles case, it was a controversy over the use of running water, determinable by the law of the locality, and arising between a riparian proprietor and an appropriator. The local law made for the appropriator. The grant and patent carried the riparian proprietor down to the bank of the stream, but did not "create" or originate the title,—that went, for its source, to the Mexican law. Standing on the river bank, what rights the patentee had in the water flowing at his feet, did not present any federal question. The Act of Congress, with its decree and patent, did not purport either to create or to enlarge the grant. It confirmed the grant, and ascertained the boundary at the river bank, leaving the question of supervening water rights to the standards of the local jurisdiction.

It is now submitted: The western boundary of "the whole of North Island" is precisely and conclusively defined to include the tideland area, by the United States patent and the official survey embodied therein. The State of California never

had title to these particular tidelands. Such lands, by elder and patented title, passed in fee simple absolute to the Mexican grantee, or his successors in interest, pursuant to the confirmation of the Mexican grant.

III.

THE PUBLIC RIGHT OF NAVIGATION AND FISHERY, AND THE PUBLIC REGULATION OF THE SAME, ARE NOT IN QUESTION HERE.

As a second and formal proposition, to be argued, it is stated in the government's brief:

> "At most, defendant company's right, title or interest, if any, in the lands below high water mark, are subject to the paramount servitudes and powers of the federal and state government to protect navigation, commerce and fishery."

It is difficult to understand why such a proposition should be selected as a topic for discussion. Nobody here is questioning the public right of regulation, and the paramount nature of the federal right. The thing is mere *brutum fulmen.*

It is said in the government's brief, that the jury were told that private ownership and use of the lands below high water mark "was subject *only* to *existing* federal regulation as to harbor lines"—"*only* to *existing* regulations of bulkhead and pierhead lines *as now* fixed by the United States government". And again, the remarkable statement is made, that by an instruction, the jury were told

that our private ownership, derived from the Mexican government, "freed these lands from any regulation by California designed to protect the navigable capacity of her harbor entrance, and from any future regulations by the federal government that might be necessary to protect the rights of navigation or the military posts across the bay". This is a revealing instance, if not of exaggeration, at least of misconception. Nothing of that kind happened.

The instruction in question deals with two specific points: (1) the private ownership of this defendant, as derived from the former government of the country in distinction from the State of California, and as extended by the United States patent to the Anchorage of Ships, precisely defined by the official survey; (2) the right of this company as an owner to construct wharves, and improvements of that kind, on its submerged lands, subject to reasonable public regulation. The United States Government had fixed a bulkhead line. This defendant, the jury were told, must conform its improvements thereto. No question of the power of either government, federal or state, to change existing harbor lines, was raised or mooted. This is the instruction (Tr. p. 105):

> "The land in question whose value you are to fix, and which has been described in the Act of Congress as the whole of North Island, includes not only the upland, as it has been termed, but also the tidelands in question. The ownership of the Coronado Beach Company in the whole of North Island does not stop at the

line of ordinary high tide. That ownership is extended out by the United States patent and by the law of this case to the Anchorage of Ships; and the line of that anchorage is precisely defined by the United States Survey accompanying the patent, and which has been delineated before you upon the maps in question.

"Such tidelands comprise, in round figures, 663 acres, and in those tidelands the Coronado Beach Company has all the rights of full ownership, subject to the reasonable public regulation; and in this respect I instruct you, that it is a reasonable public regulation of the United States Government that the bulkhead line be fixed, as it has been, beyond which a solid fill is not permissible without consent of the government, and that it is likewise a reasonable public regulation that the pierhead line be fixed, as it has been fixed, and between that line and the bulkhead line open wharves may be constructed and used by the owner. But it is a property right and an attribute of the ownership of the Coronado Beach Company, that it may construct wharves, docks, piers, warehouses, terminals or other improvements on these submerged lands, subject to these regulations; and in so constructing such improvements, the Coronado Beach Company would be exercising the right to use its privately owned tidelands.

"And you are further instructed that the title to these tidelands was not derived by the Coronado Beach Company from the State of California, and that the State of California is not the owner thereof, but that the same was derived from the former government of the country, and that the title so derived has been confirmed by judicial decree and conclusively established and defined as against the government by the survey and patent."

That is the instruction. *Res ipsa loquitur.* No question can be made as to its correctness in the matter of title, patent, and survey. And if this defendant had title to those tidelands, it was entitled to improve them with appropriate structures, subject to public regulation. If its status had been that of a mere riparian or littoral proprietor, it would remain that, in most jurisdictions, by local law, and certainly in the State of California, its rights would include access to navigability and "the right to make a landing, wharf or pier for its own use, or for the use of the public, subject to such general rules and regulations as the legislature may deem proper to impose for the protection of the rights of the public, whatever those may be" (Yates v. Milwaukee, 10 Wall. 497, 504; Greenleaf Lumber Co. v. Garrison, 237 U. S. 251, 262; Savings Union v. Petroleum Co., 144 Cal. 134, 137). But this company was more than a riparian or littoral proprietor. It owned the fee, subject to public regulation.

More than that, no question as to the right of public regulation, federal or state, was mooted at the trial, or involved in the exception to the instruction, taken below. The trial court, after completing its instructions to the jury, inquired:

> "The COURT. Are there any exceptions, gentlemen, to the charge to the jury?
>
> "Mr. DENIS. The government has none, excepting the refusal of the court to charge as requested by the government in the last instruction, in regard to tidelands (this is the instruction to the effect that the State is the

owner 'of all land' within the State below high water mark, and that private ownership 'in this State' can only extend to the high water mark: Tr. p. 105, ad. fin.). And then the government also desires to except to the instruction with reference to the *title* to the *submerged lands*. With these exceptions, I know of *no other* instruction.

"The COURT. You *particularly* refer to the instruction *that the patent extends out to the anchorage?* Including 663 acres?

"Mr. DENIS. The whole of *that* instruction, *yes*, your Honor—those are the *only* two.

"Mr. DUNNE. And, if your Honor please, the only exception we care to reserve is an exception to the returning of anything other than a general verdict. I really do not think the case requires it, and I think I would like to save the point" (Tr. pp. 104, 105).

The "precise point", then, to which counsel called the attention of the court ,and to which counsel "particularly" referred, was the instruction "that the patent extends out to the anchorage"; the precise point was "with reference to the *title* to the *submerged lands*". No question of public regulation was suggested by counsel, no correction or amplification on that head was proposed, no further instruction was asked.

"One object of an exception is to call the attention of the Circuit Judge to the *precise point* as to which it is supposed he has erred, that he may then and there consider it, and give new and different instructions to the jury, if in his judgment it should be proper to do so" (Beaver v. Taylor, 93 U. S. 46, 55).

"A party must make every reasonable effort to secure from the trial court correct rulings,

> or such at least as are satisfactory to him, before he will be permitted to ask any review by the appellate tribunal; and to that end he must be *distinct* and *specific* in his *objections* and *exceptions.* Rule 4 of this court provides: 'The party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts; and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court. Repeated decisions have emphasized the necessity of a strict adherence to this rule: 'However it might pain us to see injustice perpetuated by a judgment which we are precluded from reviewing by the absence of proper exceptions to the action of the court below, justice itself and fairness to the court which makes the rulings complained of, require that the attention of that court shall be *specifically* called to the *precise point* to which exception is taken, that it may have an opportunity to reconsider the matter and remove the ground of exception'. Harvey v. Tyler, 2 Wall. 328, 339. 'If it was intended to save an exception as to *distinct propositions* embodied in the instructions, the attention of the court should have been directed to the *specific points* concerning which it was supposed error had been committed'. Moulor v. Ins. Co., 111 U. S. 335, 337." (Allis v. U. S., 155 U. S. 117, 122.)

And in R. Co. v. Skaggs, 240 U. S. 66, 72, this court commends:—

> "the salutary rule that a party is not entitled to sit silent until after the verdict, and then insist that it shall be set aside because of a failure on the part of the trial court particularly to specify in its charge some matter to which its attention had not been suitably called."

IV.

THE APPRAISEMENT, UNDER THE ACT OF JULY 27, 1917, c. 42, 40 STAT. 247, IS OF THE WHOLE OF NORTH ISLAND, NOT SOME PART; AND THE WHOLE OF NORTH ISLAND, FOR THE PURPOSES OF THE APPRAISEMENT, IS MEASURED BY "ANY RIGHTS PRIVATE PARTIES MAY HAVE IN THE SAID ISLAND OVER AND BEYOND ANY RIGHTS THERETO IN THE UNITED STATES".

If the terms of the statute were ambiguous or uncertain, as they are not,

> "it is a well settled principle of law that if the terms of a deed are ambiguous or uncertain in describing the land conveyed, the courts will look back to prior deeds in the chain of title, to secure the true description of the land" (Davis v. Seybold, Circuit Court of Appeals, 195 Fed. 402, 412; U. S. v. McMasters, 4 Wall., p. 681; Cragin v. Powell, 128 U. S., p. 696).

This plaintiff, the United States, by a conclusive and unvacated record—by the patent and the survey, has located and defined this land, and has fixed its western boundary. And when the United States authorized, by this statute, "the *appraisement* of *any rights private parties* may have in the *said* island (whole of North Island) over and beyond *any rights* thereto in the United States", it knew, by its own record, the source, character, extent and definition of the rights of this defendant; and those rights—"any rights"—of this private owner, —it was, that the statute seeks to appraise. Such rights included as well the tideland as the upland. And it is further said in this same statute: "Upon the final ascertainment of the *value* of *any right, title* or *interest adjudged* to be in any private

claimants to the said island, there shall be paid into court the *value* of the *same,* as so determined."

The "appraisement", therefore, is to be "of any rights" we have in "the whole of North Island", over and above "any rights" thereto in the United States. The "value", as to which a "final ascertainment" is to be had, is the value "of any right, title or interest adjudged" to be in us to the said island. And the "value" which "shall be paid into court" is the value of the "same"—that is, "of any right, title or interest" adjudged to be in us. Our "right, title and interest" is conclusively established and defined by the patent and survey. What was the value, what shall be the appraisement, of that "right, title and interest"? That was the question which the jury answered by their general verdict.

> "The only proper way to construe a legislative act is from the language used in the act" (U. S. v. Freight Assn., 166 U. S. 290, 318.)

The language used in the Act of July 27, 1917, is forthright and plain. It relates to "the whole of North Island"; and it calls for the appraisement and value "of any right, title or interest" in said island, of private parties. The rights and titles of the individual, whatever they may be—*any* right, title or interest—was to be appraised and valued, the value "of the same" was to be paid, and the individual to be eliminated. "It has never been the policy of the United States", said Mr. Justice Field, "to possess interests in land in connection

with individuals" (Moore v. Smaw, 17 Cal. 201, 226).

Doubtless, "upon occasion", when the need arises from the inadequateness of language, a court may resort to the history of the times when a statute was passed, and "under proper qualifications", to the Committee Reports, including the bill as introduced and changes made in the course of its passage (U. S. v. Freight Assn., 166 U. S., p. 318; U. S. v. Ry. Co., 247 U. S. 310, 318). This, of course, does not "relax the rule that debates in Congress are not appropriate or even reliable guides to the meaning of the language of an enactment" (U. S. v. Ry. Co., supra). But while the reports of a committee of the Senate or House "may be looked at to explain doubtful expressions, not even formal reports—much less the language of a member of a committee—can be resorted to for the purpose of construing a statute contrary to its plain terms, or to make identical that which is radically different" (Penn. R. Co. v. International Coal Co., 230 U. S. 184, 199).

If, now, we leave the plain language of the statute itself, and turn to the House and Senate Committee Reports, what then?

The House Report (Vol. 1, 65th Cong., 1st sess.) consists of a simple recommendation, referring to "the whole of North Island", and the submission of a letter from the Secretary of War, to which we have already made a reference.

(a) The recommendation:

"The committee on military affairs, to whom was referred the bill (H. R. 4892) authorizing the president to take possession, on behalf of the United States, for use as sites for permanent aviation stations for the *army* and *navy*, and for aviation school purposes, of *the whole of North Island*, in the harbor of San Diego, Cal., and for other purposes,—having considered the same, report thereon with a recommendation that it do pass; and submit the following letter from the Secretary of War in support thereof."

(b) The letter of May 17, 1917, from the Secretary of War:

This letter informs the House Committee that the question in hand has received consideration "by a *joint* board of *army* and *navy* officers". The report of this board is quoted:

"The board is of the opinion that North Island, San Diego, Cal., is *the best location in the country* for the establishment of a *joint army* and *navy* aviation station for the primary training of pilots. The question of the *legal ownership* of North Island, and also the high price requested of the government *by its claimants*, have prevented for a period of several years the final determination of a site for a government aviation training station in Southern California. The board recommends that the authority of Congress be obtained for immediately taking possession of North Island, San Diego, Cal., for the *joint uses* of the *army* and *navy* air services."

The letter submits

"a draft of an act for authorizing the president to take possession of North Island for the

> aviation needs of the *army* and *navy*, giving the *claimants* to said island the right to proceed in the courts for the determination and *appraisement* of *any rights* they may have in the said island over and beyond *the rights* of the United States thereto."

And it is explained that the act has been so drawn

> "in view of the fact that the *title* of the claimants to North Island rests *on the confirmation of a Mexican grant.*"

More than that, the added information in respect to this title is communicated, of

> "the issue of a *patent* based on the *confirmation of the Mexican grant.*"

It is finally said:

> "The question is not free from doubt, and it is the view of this Department that the legislation should provide, as in the draft submitted, for the determination of the *respective rights* of the claimants and the government to these lands, and for the payment to the claimants of the *appraised value of any rights they may have* in said island over and beyond *the rights* of the United States in the premises. It is accordingly recommended *that the legislation take this form*, and that authority be granted as promptly as possible."

It is entirely clear, from this House Report, that Congress was well aware of the source, extent, character, and definition of the rights of this defendant —that its rights rested upon the confirmation of a Mexican grant, and the United States patent based on such confirmation. And it is just as clear that

the appraisement intended and, in so many words, expressed by Congress, was the appraisement "of any rights" this defendant may have in North Island over and above any alleged rights of the United States.

The Senate Report, in substance, almost in very words, is a duplicate of the House Report (Cong. Rec., Vol. 55, pt. 5, p. 5100).

It would seem that further extrinsic reference, in aid of the construction of a plain statute, is unnecessary. But we are referred, in the government's brief, to the declarations of some army and navy officers, as a guide to the interpretation of the Act of Congress. These declarations are to be found in a report of the Commission on Navy Yards and Naval Stations (House Doc., Vol. 32, Doc. 1946, pt. 3). If these declarations show anything, they put it beyond doubting that it was never the intent of Congress, in contemplating the use of North Island, as well for the navy as for the army—as well for water flying as for land flying—to leave in strange hands the tideland area of 663 acres, included in and defined by the patent, and required for and adaptable to the manoeuvering of the water-planes —hydroplanes—of the navy.

We are first referred to page 15 of House Document No. 46. Captain Cunningham, of the marines, is named as an authority on five proposed aviation sites on San Diego Bay, and in addition, one on Mission Bay. Site No. 4 has been sold, it is no longer available. Site No. 5 is to be acquired "for

advance base purposes". Site No. 2 is Coronado Heights, on San Diego Bay, and of this site, it is remarked significantly:

> "The purchase of Site No. 2, Coronado Heights, for the *army* aviation school is under consideration, and an appropriation for the purchase of such a site has been made; but in any event, *the water* in the vicinity of this site, *is too shallow for the use of naval hydroplanes*".

Site No. 3, on the east side of the bay, near its lower end, he says, "has the disadvantage of *insufficient depth of water* in its vicinity".

> "Site No. 6 is on Mission Bay, *which is too shoal for use by hydroplanes.* Mission Bay is also *cut off from the sea by a low-highway trestle.* These disadvantages *eliminate it from consideration.*"
>
> "This leaves available for consideration only Site No. 1, North Island, which contains about 1200 acres of *level* ground (so it does contain this mesa land, and an additional acreage of high ground, the meadow and marsh lands, over 200 acres, and also the tidelands), all *well above* high water, *and fronts both the bay and ocean.* Adjoining this property *on the east* is a tract of several hundred acres of shallow submerged land, known as Spanish Bight (an arm and indentation of San Diego Bay), which could be reclaimed if necessary to form an *enlargement* of North Island. The Commission of Army Officers hereinbefore referred to, reported that 'North Island is the best possible site for the location of an aviation school'."

We are not, it seems, without medical authority. At page 16 of this House Document, the fleet surgeon speaks of the "splendid isolation" (the expres-

sion is ours, not the doctor's) of North Island, "*surrounded by deep water,* and *isolated* from contaminating influences and nuisances, while yet accessible to the city conveniences". As to Coronado Heights, the doctor disapproves of "its location on *shallow water.* So, Chulavista, while good enough in a sanitary point of view, "is located on *very shallow water*". And Mission Bay is objectionable in its "remote location *on shallow water*".

At pages 28 and 29 of this House Document, we have the report of Captain Cunningham, of the Marines, mentioned in the government's brief. Of Site No. 1, North Island, the Captain says:

> "This site *contains* 1200 acres of high land, clear of all obstructions, *fairly level.*".

This is the mesa land which North Island contains, as it also contains the 200 acres of meadow land and marsh land, also above high water mark, and the tidelands to the line of the official survey. The Captain has something more to say of North Island:

> "It has *protected clear water,* of the *proper depth,* on *three sides,* and the ocean on the other side, with all the *manoeuvering* and flying space desired *on three sides.*"

He says further:

> "It has *a sloping beach, on which runways can be easily constructed.*"

Again:

> "The *water* on *three sides,* is *sheltered* and has no surf."

Again:

"This is by far the best location for an aviation base. Instruction, test, and experimental flying could be carried on here throughout the year, under the most favorable conditions, *both on land and water.*"

Again:

"Is satisfactory for dirigible hangars, both ashore or *afloat.*"

And again:

"The average *rise and fall of the tide* at this place is four feet, and the average current in the channel is two and one-half to three miles per hour."

So much for North Island. The Captain is also "illuminating" in what he says of Site No. 2, Coronado Heights. He says:

"The greater part of the *Beach Front* is *Muddy*, but has a *gradual slope*, and *runways could be built, but not as satisfactorily as at Site No. 1.*"

"Instruction, test, and experimental flying could be carried on here throughout the year, *both on land and water.*"

"It has plenty of *protected clear water* of from one to five feet depth on one side, and the ocean on the other. Is satisfactory for dirigible hangars, *afloat or ashore*, provided the necessary *dredging* is done. It would not be satisfactory for *water flying*, unless a large amount of dredging was done. With the *present depth*, it is difficult for *small boats* to reach this site. There is a four foot *rise and fall of tide*, but practically no current, as it is situated at the head of the bay."

> "The amount of dredging necessary to make this situation suitable for *water flying* and *water communication* would probably be prohibitive. Its *main advantage* is the large amount of *level* smooth *high ground*, which would be advantageous for *land flying*, and the operation of dirigibles."

Site No. 3 (on the east side of the bay, near its lower end, page 15 of the House Document), would have to be filled in, "the entire water front", to one-fourth of the full area, and "when filled in, there will be *no beach on which to construct runways.* It has plenty of *protected clear water of the proper depth, on one side* of it.

> "It would not be suited to *land flying* on account of its size, and the railroad crossing it. It is satisfactory for dirigible hangars *afloat*, provided the proper amount of *dredging* is done. The amount of *dredging* necessary to give the proper depth for *water flying* and *water communication* would probably be prohibitive."

Site No. 4 is not available. (This site has been sold—said page 15.) As to Site No. 5: This is the site intended "for advanced base purposes" (said page 15). Says the Captain:

> "There would be *no beach on which to build runways.* It has plenty of *protected clear water* on *one side.* The air conditions are satisfactory for instruction, tests and experimental flying throughout the year, *both on water and land.* Is satisfactory for dirigible hangars *afloat or ashore.*"

Site No. 6 is Mission Bay. "The *shore line*" says Captain Cunningham, is a bluff, with an aver-

age height of from 12 to 15 feet. *A beach,* on which *to construct runways* would have to be made by grading the bluff.

> "It has plenty of *protected clear water* on *three sides* of it. * * * The greater part of the bay is not satisfactory for *water flying,* on account of its *small depth* and *absence of a channel leading to deep water.*
>
> "It is not large enough for *land dirigible sheds,* and the *shallow depth* of water will not allow *floating dirigible sheds.*"

So much for Captain Cunningham's report. We are next referred, in the government's brief, to Appendix B, Part 4, of this House Document, p. 33. This goes, it is said, on data furnished by the San Diego Chamber of Commerce. As to North Island:

> "*Topographical Features.*—A practically level area. Contains 1200 acres. (This obviously means that the table land, or mesa, in distinction from the 207.24 acres of meadow, marsh and beach land, also lying above high water mark—contains, approximately, 1200 acres; speaking exactly, it is 1232.93 acres—Transcript, p. 106.) *Fronting on both the bay and the ocean, without obstruction other than* buildings used in connection with the aviation school. Shore line, *sloping beach,* with *easy access to deep water.*
>
> "*Statement of Ownership and Title.—Owned* by Mr. John D. Spreckels. (The name of the owner is not technically accurate, but Mr. Spreckels is the President and a principal stockholder of the Coronado Beach Company.) The Coronado Beach Company has *title* under *a patent issued by the United States of America.*"

The map referred to, in this connection, by the government's brief, was not admitted in the court below. It is not correct to say that this map "shows the meander of the shore line, approximately 1200 acres of fast land". This would imply that only the mesa or table land is shown. The real fact is, that the meadow, marsh and beach land is shown as well, and is distinguishably colored. It is simply a map of the upland, showing the water facilities only generally, and without indication of the grant line, under the United States patent just referred to, defined by the official survey.

At page 41 of this House Document, part 6, of Appendix B, Colonel Glassford, of the Signal Corps, commanding the aviation school at North Island, makes the significant observation touching the "Panama Aviation Schools", that they "should be situated adjacent to a sheltered bay, *permitting both land and water instruction,* but not on the shore of the open ocean, where breakers would interfere with launching of *flying boats* and *hydro-aeroplanes.* This bay should be large enough to permit the operating of many machines at the same time without interfering with one another. It should also be away from tide *flats,* and the *surrounding water* should be deep enough to permit rescue boats *moving near the shore.* Tide *flats* make forced landings disastrous. *A river* is not suitable for *water training".*

And Colonel Glassford (said page 42) speaks of the desirability of a joint service and training, army and navy, "the navy to prepare for training in *water machines,* and the army for training in land machines". And he makes (said page 43) a pointed and instructive objection to Coronado Heights:

> "A salt industry, *using adjoining tidelands,* objectionable."

Appendix C, part 1, at page 44, of this House Document, appears to have escaped the notice of the government's brief. It deals with "the different sites for aviation bases at *San Pedro,* Cal." San Pedro is the harbor of Los Angeles. The report is made by Captain Cunningham, of whom we have already heard: The Captain is not pleased with Site No. 1, at San Pedro:

> "It has *no beach,* on which *to build runways.*"

Site No. 2 is too small. As to Site No. 3:

> "This site and the area *in front of it* are tide *flats, dry at low water.* With any reasonable amount of dredging, there would not be enough *clear water at low tide* for satisfactory *manoeuvering of high power hydroplanes.* * * * Has *no beach on which to build runways.*"

And as to Site No. 4, the Captain says the same things, in the same words, as he has just said of Site No. 3. He likens Site No. 5 to Nos. 6 and 7, and of 6 and 7, considering them as one tract, he says:

"These sites have the advantage of being *on the lee shore.* Of the two sites, No. 7 is the more suitable on account of the *wider basin* at this point. There is *not enough clear water,* and any reasonable amount of *dredging* would not give enough clear water *for manoeuvering high power hydroaeroplanes at this site.* Has *no beach* on which *to build runways.*"

Of Site No. 8 he says:

"*This site has the advantage of unlimited clear water for manoeuvering. It has a sloping beach,* which would allow *easy construction of runways.*"

Of the sites at San Pedro, Captain Cunningham, in summarizing (said page 46) rejects all but two, Nos. 1 and 8. Comparing these two survivals of the fittest, he says that:

"Site No. 1 is better protected from rough water and the annual storms; it has *sufficient clear water in front* for *manoeuvering.* The absence at this site," he goes on, "*of a sloping beach on which to build launching runways,* will make necessary the construction of landing floats with aprons, or the use of derricks for hoisting aeroplanes in and out. This site is satisfactory for floating dirigible sheds; but not good for *manoeuvering* a dirigible into its shed *ashore* on account of the hill and bluff on the land side. Site No. 8 has *a sandy beach,* which allows easy construction of runways. * * * It is not suited to dirigible sheds ashore on account of telegraph wires, etc., but *floating dirigible sheds* could be used here."

He adds, as the result of experience,

"That concrete or wooden runways, *built on a firm beach with a moderate slope,* is the

most satisfactory means of launching and handling *hydroplanes* from a shore station. Where *the beach* does not have a gradual slope, it is necessary to either construct a float hinged to the shore by a wooden runway, and with a sloping apron on the water side; or to use derricks for hoisting machines in and out. The float and apron is troublesome, and easily damaged by rough waters. The derrick method is still more troublesome."

It will not excite "special wonder" that the navy yard commission should have recommended (page 17 of said House Document) the enactment of legislation to the following effect:

> "That the Secretary of the Navy is hereby authorized to acquire by purchase, through condemnation or otherwise, for aviation purposes, *all* or *any portion* of the land on San Diego Bay, California, known as North Island."

It must be very clear that a strange ownership of the beach and tidelands, out to the line of the official survey, is not a part of the fitness of things, in respect to a joint army and navy aviation site, at such a place as North Island. Certainly, the Secretary of War was wise in recommending, and Congress was careful to enact, that the "appraisement", under the Act of July 27, 1917, should be "of *any rights private parties may have* in the said island over and beyond any rights thereto in the United States".

There only remains the colloquy between Mr. Caldwell and Mr. Mann, on the floor of the House,

referred to in the government's brief (Cong. Rec., Vol. 55, pp. 5434-5). Perhaps this colloquy may point the rule that debates in Congress are not considered important, as an aid to the judicial interpretation of the statute. At all events, we give the interchange a little more fully than does the government's brief.

Mr. Mann, noticing that the Senate Amendment struck out any limitation of expenditure "for purchasing this aviation station", inquired if an estimate had been made by the War Department "as to what it would cost".

Mr. Caldwell then took the floor to say, somewhat liberally, that

> "the War Department believes that the Island will not cost us a cent, but they do not wish to be handicapped, so that, *if a suit is brought* and afterwards for any reason *they are wrong*—
>
> "Mr. MANN (interrupting). That is the wildest kind of a foolish opinion for the War Department to express—to say that it will not cost a cent, and then to object to a limitation of half a million dollars."

Mr. Caldwell then proceeds to make a statement, inaccurate in part, and the inaccurate part of which, and only that, is quoted in the government's brief. He says:

> "The facts are these, this Island has a little over a thousand acres in it, the property has been appraised generally at about a thousand dollars an acre (this is where the government's brief stops). The *claim of title* by the

United States government to the land rests on the fact that when *the Mexican government granted the property to the original grantee,* it retained the right to reoccupy the property at any time for purposes of national defense. (This is the far-fetched easement, not in the public ungranted lands, but in lands granted to settlers in private ownership.) Following the War of 1848 with Mexico, *in the Treaty of Guadalupe Hidalgo,* the United States Government obtained all the rights of the Mexican Government in any land north of the line that they drew across from the gulf to the Pacific. Now, this particular Island has been used for aviation purposes for some years, under an agreement with the people who had possession of it.

"Mr. MANN. Is it the Island at San Diego that we have been occupying under a lease?

"Mr. CALDWELL. It is the Island we have been occupying at San Diego.

"Mr. MANN. And now they propose to deny the title of the lessors.

"Mr. CALDWELL. The claimants have notified the government to get off.

"Mr. MANN. And the government claims that after it has gone into occupation under a lease, being ordered off, it can deny the title of the lessors? (Mr. Mann might have added that the government bought from the Coronado Beach Company in 1901, some 57 acres in the southwest part of North Island, for a military reservation, without questioning the title, and paid the money for it: Tr. p. 21.)

"Mr. CALDWELL. There was no lease, they had free use of the Island.

"Mr. MANN. There was a lease under a nominal consideration, I have seen the Island."

Mr. Caldwell thinks there was no lease, but "all I know about it is what the War Department has

told me". He recurs to the government's claim of easement, but "I have not searched the title" He adds:

> "If we start to take possession of this property, and court proceedings are had, *and it is found that they have title,* while we do not think they have, and it can be settled for a few dollars more than $500,000, then we cannot keep possession, we cannot settle it, we will have to try the case through the courts. If, on the other hand, they can make settlement (not being tied down by a maximum of $500,000), *if we find that the claimants have good title,* then this permits them to settle, and that is the whole question in a nutshell.
>
> "Mr. MANN. What authority is there for anyone to bring suit against the government which illegally seizes someone's property?
>
> "Mr. CALDWELL. This does not illegally seize it.
>
> "Mr. MANN. Then legally seizes it?
>
> "Mr. WALSH. The constitution.
>
> "Mr. MANN. No, the Constitution does not give them the right to bring suit.
>
> "Mr. CALDWELL. No, but the bill does."

Mr. Green, of Iowa, having noted Mr. Caldwell's remark that there was no power in the War Department to make a compromise, went on to say:

> "I do not propose to hold this up upon that ground, but it seems to me that it would inevitably result in their paying more than the amount."

Whereupon Mr. Caldwell said:

> "The proposition is this: 'The idea of the Department is to take possession of the property. They need it for the nation's defense.

> We do not want to take anything that does not belong to us, and we do not want to pay for anything that we own. We do want possession of this Island, and we want to give these people a fair chance to go into a recognized, constituted court, and *prove their claim*, and get anything that is coming to them. We do not want *to limit them*. We want to pay *all* that it is worth, no more and no less, and *all the legal claim*, no more and no less'.

And that is the appraisement provided for by the statute—of "all the legal claim, no more and no less"; of "any rights private parties may have in the said Island, over and beyond any rights thereto in the United States".

V.

THE INSTRUCTIONS TO THE JURY "AS TO THE TITLE TO, AND CHARACTER OF OWNERSHIP OF, LANDS UNDER NAVIGABLE WATERS", WERE PROPER INSTRUCTIONS, AND NO ERROR IS PREDICABLE THEREOF.

The government's brief, as a last proposition, states that this case should be reversed and remanded:

> "Because the United States was entitled to have the 1232.92 acres of land lying above high water mark valued under proper instructions as to the title to, and character of ownership of, lands under navigable waters fronting thereon."

And in support of this proposition, it is said:

> "It is confidently submitted that the government was entitled to have this high land val-

> ued by the jury, *under its requested instruction that the State of California is the owner of all land bordering upon the tidewaters within the State, and that the private ownership of lands bordering thereon could only extend to the ordinary high water mark.*"

Certainly, if anything is clear and settled, it is that the State of California is *not* the owner of *all* land bordering upon the tidewaters within the State, and that the private ownership of (all) lands bordering thereon is not limited by the ordinary high water mark. It is not necessary to go over this ground again. We have endeavored to cover it with some fullness.

> "Upon the acquisition of the territory from Mexico, the United States acquired the title to tidelands equally with the title to upland; but with respect to the former, they held it only in trust for the future states that might be erected out of such territory. *But this doctrine does not apply to lands that had been previously granted to other parties by the former government, or subjected to trusts which would require their disposition in some other way*" (Knight v. U. S. Land Assn., 142 U. S. 161, 183, per Lamar, J.; per Field, J., 201; San Francisco v. LeRoy, 138 U. S. 656, 671; Shively v. Bowlby, 152 U. S. 1, 30, 47, 48, 50, 58; Teschemacher v. Thompson, 18 Cal. 11, 22, 27-8).

The evidence of several witnesses is quoted at some length in the government's brief, as having been admitted "to prove that the ownership of the tidelands as a unit with the uplands was a material factor in arriving at the value of the uplands".

It is not denied that such unitary ownership was a material factor in that regard, and it is conceded that such evidence "was admitted apparently without objection and without exception". The testimony is referred to as "glowing", as to the developmental possibilities "based upon the exclusive ownership of the tidelands and the development of the tidelands, backed up by unity of ownership with the highlands, and the expressed opinion of experts that this unity of ownership was a very material factor in the valuation of the highlands". But this "glowing testimony", it is conceded, "was admitted apparently without objection and without exception". And the government's brief falls back upon the refusal of the court to give its requested and erroneous instruction, "that the State of California is the owner of *all* land bordering upon the tidewaters within the state, and that the *private ownership* of lands bordering thereon could *only* extend to the ordinary high water mark".

And if it were necessary further to labor the point, this plaintiff itself requested the court to instruct the jury to find "the value of the land *claimed by the defendant*" as a unit and a whole, in its entirety, specifying the full acreage—"2147 acres"; and to instruct the jury, as an additional verdict, to find the value of the land above high water; and to instruct the jury to find, as still another verdict, the value of the tide and submerged land. We quote the language of plaintiff's counsel:

"Mr. Dennis. If your Honor please, I expect to ask the court to instruct the jury to find three verdicts: one, the value of the land claimed by the defendant, 2147 acres; another, the value of the land within the high water, 1297 acres, less a small body of land belonging to the government; third, the value of the lands outside of the uplands, in other words, the tide and submerged lands. Your Honor made that suggestion months ago, and neither side could see its way clear, but as the case has shaped itself, the government expects to ask you to instruct the jury to find those three verdicts" (Tr. p. 42).

Accordingly, the court instructed the jury to find:

"1. The fair market value of the whole of North Island, as of August 1st, 1917.

"2. The fair market value, on August 1, 1917, of the land lying above high water mark, containing 1,232.93 acres, more or less, referred to as mesa land;

"3. The fair market value on August 1, 1917, of the 207.24 acres lying above high water mark, referred to as meadow, marsh, and beach land;

"4. The fair market value, on August 1, 1917, of the lands lying below high water mark, consisting of 663.3 acres, more or less, referred to as tide or submerged lands" (Tr. pp. 18, 104).

No objection, as we have seen, was taken by plaintiff to the form or language of these verdicts, or to the instruction of the court submitting the same to the jury (Tr. p. 104). The only exception reserved to the instructions, in this behalf,

was, consistently enough, taken by this defendant, which objected "to the returning of anything other than a general verdict" (p. 105).

If, now, the court, as requested by plaintiff at the trial, instructed the jury to find "the value of the land *claimed by the defendant*", full acreage specified, "2147 acres" (Tr. p. 42), it must be that this defendant, all other considerations apart, had the clear right to offer testimony responsive to that issue. Quite apart from the consideration that our ownership extended to the line of anchorage, as defined by the official survey, embracing upland and tideland in a unitary ownership, that was the land, as an entirety, that was "claimed by the defendant" in its full acreage. It is too late, now, for this plaintiff, after proposing such an issue, and after its proposal had been accepted by the court and embodied in the verdict, and the case had been tried, without objection or exception, on that theory, to seek now "to mend its hold" by a change of position.

> "It is not competent to a party to assent to a proceeding in the court below, take his chance of success, and, upon failure, come here and object that the court below had no authority to take the proceeding" (Mays v. Fritton, 20 Wall. 414, 418).

The evidence, as conceded in the government's brief, "was admitted apparently without objection and without exception, expressly directed to prove that the ownership of the tidelands, as a unit with

the uplands, was a material factor in arriving at the value of the uplands". The land "claimed by the defendant" was a unit—upland and tideland; and the form of verdict requested by plaintiff went to the value of that land; to the value of the upland as a part of the same larger unit of which the tideland was claimed to be a component. No instruction was proposed by plaintiff, calling the court's attention to any discrimination in the application of the evidence, as between one form of the verdict and another. Nor was anything in the instructions, as actually given, excepted to by the plaintiff, other than the refusal of the court to give plaintiff's instruction touching the alleged State title, and the giving of the instruction by the court "with reference to the *title* to the submerged lands" (Tr. p. 104)—the instruction, that is to say, which carried our title out to the line of anchorage, as "precisely defined by the United States Survey accompanying the patent" (Tr. p. 105).

If, then, it were necessary,—laying out of view our clear title, unqualified by State ownership, to the line of the official survey—we might well invoke here

> "the salutary rule that a party is not entitled to sit silent until after the verdict, and then insist that it shall be set aside because of a failure on the part of the trial court particularly to specify in its charge some matter to which its attention had not been suitably called" (Illinois Central R. R. Co. v. Skaggs, 240 U. S. 66, 72).

The government's brief mentions "an added assignment of error to the action of the court in admitting in evidence the map—Exhibit D"—and assumes to state, in a general way, the ground of the objection. We give the actual record (Tr. p. 47):

> "The WITNESS. I have prepared two maps or diagrams, one on this scale and one on a little larger scale, *illustrating the commercial adaptability of these tidelands, as I understand such adaptability to exist* (map is placed in position on the board).
>
> "Mr. DENIS. Before that map is exhibited. the government wishes to object to it, your Honor, on the ground that it is incompetent, immaterial, and irrelevant.
>
> "The COURT. I understand it is *only* offered *for the purpose of illustrating the testimony of the witness.*
>
> "Mr. DUNNE. Yes, sir; *for no other purpose.*
>
> "Mr. DENIS. That is the basis of the objection—the testimony of the witness to show by map the *subdivision* of the property is irrelevant, incompetent and immaterial, and includes the objectionable evidence of *speculative* value. *I will concede,* of course, that the witness for the defendant may testify to the highest price for which *the property is adaptable,* but I must contest the proposition that in showing that highest price they are permitted *to show the number of residential lots into which that property may be subdivided.* They can testify that it is subject to subdivision, but not to the subdivision of the property into lots, *especially* if it be followed by testimony as to what those lots may be worth *after* subdivision."

The foregoing is the entire objection—beginning, middle and end—to this map.

> "The COURT. Well, I think the latter statement is true—that they would not be permitted to testify to what separate lots are worth.
>
> "Mr. DUNNE. Oh, no. This is a strictly limited offer, for the purpose of illustrating the testimony of the witness.
>
> "The COURT. Well, as a part of the witness' testimony, it may be exhibited to the jury. *It is understood, of course, that the speculative value cannot be put upon this land.*
>
> "Mr. DENIS. The government excepts. Your Honor, can it be stipulated——
>
> "Mr. DUNNE. Yes, indeed, Colonel.
>
> "The COURT. *Rulings* will be excepted to.
>
> "Mr. DENIS. That the rulings will be excepted to.
>
> "The COURT. All right." (Tr. pp. 47-8).

It is not strictly regular in the federal practice, indeed, it is not permitted, that an objection to testimony, followed by a ruling, should be availed of on review, unless the ruling is excepted to.

> "No ruling upon evidence is open to revision, because none appears to have been excepted to" (Hanna v. Maas, 122 U. S. 24, 26; Hutchins v. King, 1 Wall. 53, 60; Wasatch Co. v. Crescent Co., 148 U. S. 293, 298). Nor will the proceedings in the federal court be controlled, in this regard, by the practice or statute of the state (St. Clair v. U. S. 154, U. S. 134, 153).

The Code of Civil Procedure of California, where objection has been made and a ruling taken, dispenses with the exception. This was in the mind

of plaintiff's counsel, for he immediately proceeds to say:

> "Mr. DENIS. I don't know that it is strictly regular, but I thought it would save time.
>
> "The COURT. I think the provisions of the Code of Civil Procedure of California apply here, and you might stipulate it.
>
> "Mr. DUNNE. Yes, sir; and I will join with Colonel Denis.
>
> "Mr. DENIS. Well, I think myself it is advisable to save the time of the court." (Tr. p. 48).

It was then the agreement of counsel, endorsed by the court, to adopt the California practice at the trial—that is to say, when *objections* were made and *rulings* given, *the rulings* should be deemed excepted to.

> "It is the duty of the party excepting to evidence *to point out the part* excepted to, so that the attention of the court may be drawn to it" (U. S. v. McMasters, 4 Wall. 680, 682; Burton v. Griggs, 20 Wall. 125, 133).

Plaintiff's counsel, in stating his objection to the map, observed generally that it was "irrelevant, incompetent and immaterial, and includes the objectionable element of speculative value". So far forth, the objection was "very general and indefinite", it failed "to call the attention of the District Judge to the precise point" wherein the map included a feature or element of speculative value (U. S. v. McMasters, supra; Burton v. Griggs, supra; Upton v. McLaughlin, 105 U. S. 640, 646). Counsel admitted the propriety of tes-

timony as to the property, expressive of "the highest price for which the property is adaptable", and that "it is subject to subdivision". His specific objection was to testimony "as to what those lots may be worth *after* subdivison". The court at once ruled that witnesses "would not be permitted to testify what separate lots are worth", and this defendant's counsel took the same view, and announced that the map was "a strictly limited offer, for the purpose of illustrating the testimony of the witness". The court ruled that

> "it is only offered for the purpose of illustrating the testimony of the witness",

and for that purpose admitted it, with the explicit statement:

> "It is understood, of course, that the *speculative value* cannot be put upon this land."

Counsel for plaintiff, in making his specific objection to what the "residential lots", as he expressed it, "may be worth *after* subdivision", was well within the law when he admitted the propriety of testimony as to the adaptability of the property for such subdivision.

> "The inquiry in such cases must be, what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what it is worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve

the necessities or conveniences of life" (Boom Co. v. Patterson, 98 U. S. 403, 408).

"What is the value of the property for the most advantageous uses to which it may be applied? That is the proper inquiry."

And again:

"the peculiar fitness of the lands for particular purposes as an element in estimating their value" (Boom Co. v. Patterson, supra, p. 410, p. 409).

The specific and only point of objection made by counsel in respect to 'speculative value" was addressed to the "residential subdivision" of the property, "especially as to what those lots may be worth *after* subdivision". But defendant's counsel did not propose to show any such value, nor did the court intended to admit it. No such value of residential lots, after subdivision, was exhibited by this map, nor, for the matter of that, was it testified to by any witness. There is not a suggestion as to value, of any kind, "looking before or after", on this map.

In Wilson v. Equitable Gas Co., 152 Pa. St. 156, it was said:

"In estimating the value of the lot before taking, its possible and probable uses were important elements, and might be shown by the testimony of expert witnesses."

And again:

"It was competent for the plaintiff to show that a portion of it was ripe for building improvements, or for any other purpose that enhanced its value."

And further:

> "It will be noticed that the case lacks the speculative element in R. Co. v. Cleary, 125 Pa. St. 442. The evidence does *not* show that the witnesses base their testimony upon what they supposed the lots might have been sold for, and the price which they would bring, *after* the pipe line was paid. There was no inquiry as to what a speculator might be able to realize out of a resale of the lots in the future."

The map itself, in its aspect of "residential subdivision", does not even contain a subdivision into lots. No lots are shown. The subdivision is into blocks and streets. Spanish Bight, an arm of San Diego Bay, adjacent to the east side of the property, is available for a yacht harbor or aquatic park, and is so marked—no objection was made to this feature. The only other feature of the map is that of the wharves and piers, to which the tidelands in question are adaptable for commercial purposes. No objection was specified to this feature of the map. An objection was interposed, however, to a question put to Mr. Holmes, after he had testified to the adaptability of the property:

> "Mr. Dunne. In your judgment, having regard to the commercial adaptability of those tidelands on the first of August, 1917, what in your opinion was their fair market value?" (Tr. 50).

This question was objected to by plaintiff's counsel, "unless the witness shows that he was familiar with tideland values in the Bay of San

Diego". It was in the course of discussing this objection that counsel for defendant made the statement referred to in the government's brief:

> "I am now inquiring of this witness his opinion touching the market value of the property, in view of its adaptability for the purposes indicated upon this map, not as to its value when all these improvements have been made and constructed, and you have a going concern—such a value might be fabulous—but its present value, or its value as of the first of August, 1917, in view of the fact that that intact and unbroken waterfront ownership is presently adaptable to these commercial uses, and was so adaptable in August, 1917" (Tr. p. 51).

Whereupon, counsel for plaintiff remarked:

> "The point that I make is not as to the lack of qualifications of this witness, but *I want the witness asked* whether he knows the value of tidelands as of that date, or approximately that date" (Tr. p. 51).

The question objected to was left unanswered, the suggestion of plaintiff's counsel was acted upon, and the following question put to the witness without objection:

> "Now, I will ask you what, in your judgment, was the fair market value of these tidelands, as of August 1, 1917"; and the witness gives his estimate, "between five and six thousand dollars per acre" (p. 51).

This map was made by the witness

> "with a view of the adaptability of the land in August, 1917" (Tr. p. 51) "as I understand

such adaptabilities to exist" (p. 47). "I base my estimate of five to six thousand dollars an acre on these tide lands for their value in August, 1917, as they stood, without any reclamation, from the fact that they were adaptable to be improved, as shown. In this map, and in all of my direct testimony, I took into consideration the business needs of San Diego at that time, or in the immediate future." "It is not a fact, from my knowledge of the business wants of San Diego, that it will be 20 or 25 years before this land can be used, as I have shown it to be adapted. I don't think it would be 20 or 25 years, it might be 10 or 12 years, something like that—business of that sort, when it once starts, grows very rapidly" (Tr. p. 53). "I am trying to indicate that the lands were adaptable in 1917 for such purposes" (Tr. p. 51).

Question by the court:

"In giving your estimate of the value of these lands, did you base your opinion upon anticipated investments of a large amount of money, or expensive improvements and water works, or did you base it upon simply the adaptability of the land as of August first, 1917?

A. I based it upon the adaptability of the land as it was in August, 1917" (Tr. p. 58).

No objection was made to the foregoing testimony of Mr. Holmes.

In the case of Union Terminal R. Co. v. Peet Bros., 48 Pac. 860, 861, it was said by the Supreme Court of Kansas:

"William Peet, President of the Manufacturing Company, was permitted to testify to the business carried on by the Peet Brothers

Manufacturing Company; the size of the buildings already constructed on the west tract; that they had a soap plant at the foot of Delaware street, in Kansas City, Mo.; that they *contemplated* the construction of buildings on the east tract for their soap plant. He was then asked with reference to the kind of buildings they had planned to construct on the east tract, and stated that their plans were to put up a main building, 80x120 feet, 4 stories, with a kettle room adjoining, 50x80 feet, three stories and a basement, for the purpose of manufacturing soap. Various witnesses were asked, in making their estimates for damages, to take into consideration these plans; and in view of the contemplated use of the two tracts together, to state the fair market value of the different tracts of land before and after the appropriation of the right of way.

"Complaint is made of this testimony. It is urged that the jury were led to base their estimate of damages on an air castle, existing then only in the imagination of the witnesses, and which might never take any more substantial form. It is conceded that it was proper to show the various uses to which the tract was adapted, and for the jury to take into consideration any beneficial use to which the property might be put. But it is urged that in this case the testimony went further, and that it was sought to give substance and reality to that which might never actually exist. If the plaintiffs had gone further, and attemptd to show either the value of the east tract *as it would have been* with the buildings *constructed* on it. or the *profits* they might have derived, or the *savings* they might have made by using the *proposed* buildings in connection with the plant they *then* had, there would be great force in the objection to the testimony. But the witnesses were, after all, required to estimate the market

value of the land as it *then* was, before and after the appropriation (of the railroad right of way); and the only purpose for which they were authorized to take the contemplated improvements into account was to determine the value of the property in the condition it was *at the time* of the condemnation. We are inclined to think that the testimony actually given was scarcely more than one method of stating a purpose to which the land was adapted, and that the jury was quite competent to weigh the probabilities of its ever being employed for any such purpose."

In Ry. Co. v. Longworth, 30 Ohio St., pp. 111-112, the court quotes from Cockburn, C. J. (Queen v. Brown, L. R. 2 Q. B. 630), as follows:

"A jury, whether the dispute be as to the value of land required to be taken by the company, or as compensation for damages by severance, in assessing the amount to which the land owner is entitled, have to consider the real value of the land, and may take into account not only the present purpose to which the land is applied, but also any other more beneficial purpose to which, in the course of events at no remote period ("much must be left to the discretion of the presiding judge in determining whether the time was too remote"; Ry. Co. v. Holloman, 114 Pac., p. 701), it may be applied, just as an owner might if he were bargaining with a purchaser in the market. That is the mode in which the land should be valued."

The Supreme Court of Ohio goes on to say:

"This plat was therefore admissible, not only to show the location of the property and the course of the railroad through the same, and

its availability for subdivision into small lots; but also to show that it had been so already subdivided, and as the basis for showing that the property was more valuable in that shape than as an entire tract."

In Ry. Co. v. Holloman, 114 Pac. 700, 701,

"defendant had prepared a plat of the land, showing the same divided into streets and alleys, lots, and blocks, and the location of various objects thereon. * * * After it had been used by plaintiff in the examination of some of its witnesses, defendant, for the purpose of showing the adaptability of the land for townsite purposes, and that it had been surveyed and platted into an addition to the townsite of Frederick, a town of about 3,000 inhabitants, built upon the north half of said section, over the objection of plaintiff introduced the plat in evidence. In this, it is claimed, the court erred, as it completely changed the rule as to the measure of damages. Had the court charged incorrectly on the measure of damages, we might agree with this contention, but as it did not,—or so we presume, since the charge was unexcepted to,—we cannot concur. This was, in substance, the error complained of in Ry. Co. v. Davidson, 49 Kan. 589, a similar proceeding. There the court in the syllabus said: 'Where a railroad company has taken and appropriated land for railroad purposes by virtue of condemnation proceedings, the owner of the land may recover for its depreciation in value, taking into consideration any purpose for which it might be the most profitably used. And in such a case, where the land was situated near a city, and, although used as a farm, was suitable for subdivision into lots, blocks, etc., and for an addition to the city, such facts may be taken into consideration in

determining the market value of the land and the amount of its depreciation in value by reason of the taking and appropriation of a part thereof by the railroad company for railroad purposes'. There, as here, the land owner, to show for what the land might most profitably be used, introduced in evidence, over objection, a plat showing its subdivision into lots, blocks, etc., and the court held the same to be no error."

In Rock Island etc. Ry. Co. v. Gordon, 59 N. E. 810, 811, it was said by the Supreme Court of Illinois:

"Before the petition for condemnation was filed, the appellees had made a plat of the land in question into lots and blocks for residence purposes. A copy of this plat was introduced in evidence upon the hearing of the cause, and appellant complains of its admission as error. It was not pretended that the land had been platted and improved by the grading of streets and sidewalks, etc. On the contrary, it was a fact known to the jury from their personal inspection (as likewise in the case at bar, Tr. p. 43 ad fin.) that the plat represented only a contemplated improvement, to which, as it was thought, the land was adapted. Undoubtedly, if the object had been to enhance the damages by showing that the erection of residences thereon would be a *profitable investment*, the testimony would have been clearly inadmissible. But the plat was merely offered as an illustration of one of the uses to which the property was adapted, and by way of showing the capabilities of the property. The evidence in regard to the plat was *expressly limited to this object* in the questions of *counsel* for the appellees, *and by an instruction upon the subject given by the court to the jury.*"

And in Ry. Co. v. Moore, 15 N. E. 764, 766, it was said by the Supreme Court of Illinois, in respect to property available for wharves and docks, in language applicable as well to property available for residential purposes:

> "If these lots were available for dock purposes, for which, as shown, there was no immediate demand, their *value, when improved* by the building of docks, the *profits* that might be derived therefrom, or the *value* of the lots at some *future time*, as when business or the wants of the community might make *profitable* the making of docks or slips on this property, would be merely conjectural and remote, forming no proper element in estimating the damages to be paid. But if the fact that these lots were located with a frontage on the river, at a place where they could, at some future time, when demanded, be made available as dock property, enhanced their *present* market value in their *then* condition and state of improvement or want of improvement, that fact would be competent and proper to be shown, and be considered by the jury in estimating the damages. If, in consequence of their supposed adaptation to such use, they had an increased market value above what they otherwise would have, such value forms the proper basis of recovery."

Now, then, as was the case in Rock Island etc. Ry. Co. v. Gordon, supra, so, in the case at bar, the subject was covered, and fully, by the instructions of the court. The jury were told:

> "It is proper to inquire what the tract is worth, having in view the purposes for which it is best adapted. But it is the tract, and not the lots into which it might be divided, that is

to be valued. You are to value the tract of land, and that only. You are not to determine how it could best be divided into building lots, or to conjecture how fast they could be sold or at what price per lot. A speculator or investor, in deciding *what price* he could *afford to pay,* would consider the chances and probabilities of the situation as *then* actually existing. You should do the same thing. You are not to inquire what a speculator owner might be able to realize *in the future,* but what a *present purchaser* would be willing to pay for it in the condition it was *at the time of the taking.* If the property is available for building lots, or available for commercial purposes or wharves or docks or terminals or industries, or any other legitimate use, even though it may not be used for any of those purposes, or may be left unused by the owner, such availabilities are all to be considered, and they should enter into the estimate of the compensation which must be paid for the land taken. *Mere speculative values, and profits in the manipulation of the property are, of course, to be excluded.* The condition of the property, the use to which it may be put, having regard to the existing advantages for making a practical use of the property, and such advantages as may be reasonably expected in the immediate future, are all matters for consideration in estimating the value of the land. But to attempt to ascertain the value by estimating the cost of improvements necessary for its use for a particular purpose, the cost of subdivision and sale, the prospect of sales and estimated profits and increased demands through growth of population, would be speculative. In other words, the value cannot be determined by taking into consideration what would be the earning power of the property after a large investment of capital is made" (Tr. p. 101).

And the court further instructed the jury:

> "Plats and maps of the property in question have been received in evidence and should be considered by the jury, not for the purpose of exhibiting some contemplated improvements or speculative deals, but for the purpose of illustrating the witness's testimony concerning the particular uses to which the property may be adapted in his opinion, and by way of showing the capabilities of such property. With this limitation, and from this point of view, maps and plats have been admitted in evidence in this case, and as thus limited and qualified, it is proper for the jury to consider them for such illustration and enlightenment as they may afford touching the uses and capabilities of the property" (Tr. p. 103).

It is respectfully submitted:

I. Under the Act of July 27, 1917, c. 42, 40 Stat., 247, the judgment of the district court is not removable to this court, for the exercise of appellate jurisdiction, by writ of error.

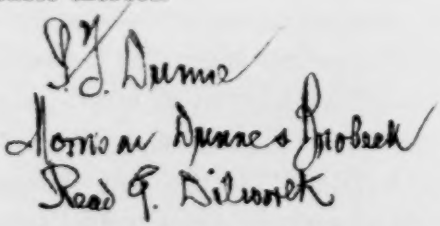
II. The western boundary of "the whole of North Island" is precisely defined to include the tideland area, by the United States patent and the plat of survey accompanying the same and a part thereof. The State of California, as of its sovereign status, never had title to these particular tidelands, lying inside of the boundary line fixed by the United States survey which supervened upon the decree of confirmation and accompanied the patent. These particular tidelands, by elder and patented title, passed in fee simple absolute to the Mexican

grantee, or his successors in interest, pursuant to the confirmation of the Mexican grant.

III. The public right of navigation and fishery, and the public regulation of the same, are not in question here.

IV. The appraisement, under the Act of July 27, 1917, c. 42, 40 Stat., 247, is of the whole of North Island, not some part; and the whole of North Island, for the purposes of the appraisement, is measured by "any rights private parties may have in the said island over and beyond any rights thereto in the United States".

V. The instructions to the jury "as to the title to, and character of ownership of, lands under navigable waters", were proper instructions, and no error is predicable thereof.



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